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THE SEVENTH YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

By Manley O. Hudson

Bemis Professor of International Law, Harvard Law School

Several important events have marked the seventh year in the history of the Permanent Court of International Justice. The court was in session at The Hague from February 6, 1928, to April 26, 1928 (thirteenth session); from June 15, 1928, to September 13, 1928 (fourteenth session); and from November 12, 1928, to November 21, 1928 (fifteenth session). It handed down two advisory opinions (Nos. 15 and 16) and two judgments (Nos. 12 and 13), and several important orders. It lost the services of two eminent judges through the resignation of Judge John Bassett Moore and the death of Judge André Weiss.[2] A settlement was reached with the Netherlands Government of the long-standing question as to the privileges and immunities of the judges and registry officials; and, what is perhaps more important for the court's future, the signatories of the court's protocol of signature began the consideration of changes in the court's statute in the light of seven years' experience. The seventh year marks progress in the establishment of the court's position as the chief agency in the world for the international administration of justice, as it marks also changes which will affect the future of the court.

JURISDICTION OF THE COURTS OF DANZIG

The Treaty of Versailles of June 28, 1919, provided (Article 103) for the submission of differences between Poland and the Free City of Danzig, in regard to the treaty itself or agreements concluded under it, to the High Commissioner of the League of Nations at Danzig, and the convention concluded between Poland and the Free City on November 9, 1920, effecting the control of Danzig railways by Poland, contained a similar provision.[3] On July 20, 1921, Poland and the Free City concluded a provisional agreement, and on October 22, 1921, a definitive agreement (*Beamtenabkommen*) concerning the transfer of the railway officials to the service of the Polish Railways Administration.[4] By the terms of Article 1 of the latter, the

[1] Continuing the series of annual articles begun in this Journal, Vol. 17, No. 1, January, 1923.

[2] Judge André Weiss, Vice-President of the court, died at The Hague, during the night of August 30–31, 1928. In appreciation of his services, the sitting of the court on September 13, 1928, was suspended, after a eulogy pronounced by President Anzilotti.

[3] 6 League of Nations Treaty Series, p. 190.

[4] Publications of the Court, Series B, No. 15, p. 37.

officials were required to file a declaration of their desire to remain in the Polish service. This declaration was to refer to the *Beamtenabkommen*, and the declarants were forbidden to make "any additions or further conditions."[5] In 1925 the Danzig railway officials who had passed into the service of the Polish Railways Administration brought actions against the Administration in the courts of Danzig for certain pecuniary claims, based on the agreement of October 22, 1921. The Polish Administration denied the jurisdiction of the Danzig courts to maintain such actions, and on January 11, 1926, the Polish Government informed the High Commissioner that it would not in future take cognizance of the actions and would not enforce the judgments of Danzig courts in such cases. Thereafter, the Danzig Senate asked the High Commissioner to give a decision concerning the question of the jurisdiction of the Danzig courts, and to decide that the transferred officials were entitled to bring actions in respect of pecuniary claims, even if such claims were based on the *Beamtenabkommen*. On April 8, 1927, the High Commissioner handed down a decision to the effect that the pecuniary claims of transferred employees, and in particular claims in connection with wages, pensions, half-pay and other grants under the contract, may form the subject of an action in the Danzig courts, but that the clauses of the agreement itself, and the declarations referred to in Article 1 of the agreement, are not to be regarded as provisions which constitute the contract of service so as to give ground for a personal action. On May 12, 1927, the Government of the Free City of Danzig appealed from this decision to the Council of the League of Nations,[6] asking that the decision be annulled and that the Council should decide that transferred railway officials were authorized to recover pecuniary claims, arising out of their conditions of service, in the Danzig civil courts, even when these claims were based on the agreement of October 22, 1921, or the declaration made under that agreement. The question came before the Council of the League of Nations at its forty-seventh session, and on September 22, 1927, the Council asked the Permanent Court of International Justice to give an advisory opinion on the following question:

> Is the court of opinion that the High Commissioner's decision of April 8, 1927, given as a result of the requests made by the Danzig Government on January 12, 1927—in so far as his decision does not comply with those requests—is legally well founded?

In conformity with Article 73 of the Rules of Court, the request was communicated to the members of the League of Nations and to states entitled to appear before the court, and the Governments of Poland and the Free City of Danzig were informed that the court would receive either written or oral statements on their behalf. Memorials were filed with the court on behalf

[5] See League of Nations Document C. 375. 1927. I.

[6] Provision for appeal to the Council is made in Article 39 of the convention of November 9, 1920. 6 League of Nations Treaty Series, p. 205.

of both the Polish and Danzig Governments, and public sittings were held on February 7 and 8, 1928, during which the court heard oral arguments by Professor G. Gidel, on behalf of the Free City of Danzig, and by Mr. J. Limburg, on behalf of Poland. It is interesting to note also that both Poland and Danzig were permitted to name judges *ad hoc*, under the amendment to the Rules of the Court adopted on September 7, 1927, and that the Free City of Danzig named Professor Viktor Bruns, a German national, who sat as its judge on the court. The court's unanimous opinion was given on March 3, 1928.[7]

The court first considered who were the persons covered by the expression "officials"—some of the documents referred to "employees"—and decided that the question before it should be construed as referring to officials only and not to employees. It was noted that the first part of the High Commissioner's decision of April 28, 1927, was excluded from the question put to the court, for from that part of the decision there had been no appeal.

On the principal question before the court, it was contended on behalf of Poland that the *Beamtenabkommen*, the agreement of October 22, 1921, created rights and obligations between the contracting parties only and could not create rights or obligations of the individuals concerned; and that if Poland had failed to carry out its international obligations, she was responsible only to the Free City of Danzig. It would follow from this contention that the legal relations between the Polish Railways Administration and the former Danzig officials were governed solely by the Polish national law. On behalf of Danzig, it was contended that the *Beamtenabkommen* constituted part of the series of provisions which established a legal relationship between the Railways Administration and its employees.

On this difference the court formulated the point in dispute as follows: "Does the *Beamtenabkommen*, as it stands, form part of the series of provisions governing the legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service (contract of service)?" The court admitted it to be a well-established principle of international law that the *Beamtenabkommen*, "being an international agreement, cannot, as such, create direct rights and obligations for private individuals." However, it is possible for states to enter into an agreement of which the object is the adoption of definite rules creating individual rights and obligations which may be enforceable by international courts. The principle of interpretation applied in this case was that "the intention of the parties, which is to be ascertained from the contents of the agreement, taking into consideration the manner in which the agreement has been applied, is decisive." While Article 9 of the *Beamtenabkommen* provides that "all matters affecting officials and workmen transferred to the Polish service shall be dealt with by the Polish State Railways Administration," the court thought this should not be construed to make the applicability of the pro-

[7] Publications of the Court, Series B, No. 15.

visions of the instrument depend upon their incorporation into a Polish regulation. It therefore reached the conclusion that the *Beamtenabkommen* "constitutes part of the special regulations which govern the relations between the Polish Railways Administration and the officials concerned"; from which it followed that the Danzig officials have a right of action against the Polish Railways Administration for the recovery of pecuniary claims based upon the *Beamtenabkommen*.

The court then examined the effect of the special provisions in Article 1 of the agreement of October 22, 1921, and reached the conclusion that "a determination of the nature and legal effects of the declaration is of no practical value for the purpose for which the court is asked to give an advisory opinion." It follows from the court's conclusion as to the nature of the *Beamtenabkommen* that judgments of the Danzig courts on pecuniary claims based on the *Beamtenabkommen* should be recognized by the Polish Railways Administration, though, of course, the Polish Government may have recourse to the international procedure open to it in case the jurisdiction of the court is exceeded.

The court then proceeded to examine the same question with reference to Danzig's original application of January 12, 1927, that is, "in regard to the extent of Poland's obligation to recognize the jurisdiction of Danzig tribunals for pecuniary claims against the Polish Railways Administration." A previous High Commissioner, General Haking, had decided on December 5, 1921, that "everything connected with the Polish Railways Administration within the territory of the Free City is subject to the civil and criminal courts of Danzig." This decision was held to constitute "the legal basis of the jurisdiction of the Danzig courts." The question before the High Commissioner had been therefore: "Do the judgments on pecuniary claims of railway officials, based on the *Beamtenabkommen* or on the declaration, fall within the jurisdiction contemplated in the decision of September 5, 1921, or are they in conflict with any rule of law internationally binding upon Danzig?" The jurisdiction of the courts of Danzig implies their power to decide what substantive law is applicable in a given case to which the jurisdiction extends. The Danzig courts' application of the *Beamtenabkommen* must be considered as being in conformity with international law. The court therefore concluded that the decision of the High Commissioner of April 8, 1927, was not legally well founded, and by unanimous vote this answer was given to the question submitted for an advisory opinion.

The opinion came before the Council of the League of Nations at its forty-ninth session on March 9, 1928.[8] At that time the Council had before it an agreement concluded between the Governments of Poland and the Free City of Danzig on March 2, and formally signed on March 6, "to the effect that the Council should be asked not to place the question on the agenda because the parties had agreed to accept the Court's opinion in

[8] League of Nations Official Journal, April, 1928, p. 433.

advance." The subject was placed on the agenda of the Council, however, and the Council contented itself with taking formal note of the opinion and the agreement.

RIGHTS OF MINORITIES IN UPPER SILESIA

On January 2, 1928, the German Government instituted a suit concerning the exercise of the rights of minorities in connection with public schools in Upper Silesia, asking for judgment to the effect that:

> . . . Articles 74, 106 and 131 of the German-Polish convention relating to Upper Silesia of May 15, 1922, establish the unfettered liberty of an individual to declare according to his own conscience and on his own personal responsibility that he himself does or does not belong to a racial, linguistic or religious minority and to choose the language of instruction and the corresponding school for the pupil or child for whose education he is legally responsible, subject to no verification, dispute, pressure or hindrance in any form whatsoever by the authorities; that any measure singling out the minority schools to their detriment is incompatible with the equal treatment granted by Articles 65, 68, 72, paragraph 2, and the Preamble to Division II.

The German Government's application was forwarded to the Polish Government on January 3, 1928. At the same time the President of the court fixed the time limits for the filing of documents in the written proceedings. After some extensions of these limits, the written proceedings were concluded on March 10, 1928. The case was regarded as urgent, and hearings were held on March 13th, 15th and 17th. The German Government was represented by Dr. Budding, President of the District of Marienwerder, and the Polish Government by Mr. J. Mrozowski, President of the Supreme Court of Warsaw. The Polish Government's counter-case asked the court:

> to dismiss the German Government's claim: or, in the alternative, to give judgment to the effect that Articles 69, 74, 106 and 131 of the German-Polish convention of May 15, 1922, concerning Upper Silesia establish the freedom of every national to declare, in accordance with his conscience and on his personal responsibility, that he does or does not belong to a racial, linguistic or religious minority and also to declare what is the language of the child or pupil for whose education he is legally responsible.

The German reply did not amend the German submissions, but in its rejoinder the Polish Government argued that the German reply had excluded the question of the interpretation of Article 69 of the Geneva convention and that on this ground the court should decline jurisdiction; but it was also contended that the case before the court had already been settled by the Council of the League of Nations. The court's judgment was given on April 26, 1928.[9]

After the plebiscite in Upper Silesia, held on March 20, 1921, a decision

[9] Publications of the Court, Series A, No. 15.

concerning the partition of Upper Silesia between Germany and Poland was given by the Conference of Ambassadors on October 20, 1921, in line with which the German and Polish Governments concluded a convention at Geneva on May 15, 1922.[10] The Conference of Ambassadors stipulated that the Minorities Treaty signed by Poland on June 28, 1919, should apply in Polish Upper Silesia and that Germany should accept for a limited period similar obligations for German Upper Silesia. The present dispute arises out of the application of the provisions in the Geneva convention concerning the protection of minorities. During 1926, after an inquiry, the names of various children entered in the registers of minority schools were dropped from the registers and such children were excluded from the schools in the fall of 1926. On September 25, 1926, the *Deutscher Volksbund für Polnisch Oberschlesien* succeeded in bringing the question before the President of the Mixed Commission, whose appointment was provided for by the Geneva convention, and on December 15, 1926, the President handed down a decision.[11] The Silesian authorities did not comply wih this decision in its entirety, and the *Deutscher Volksbund* appealed to the Council of the League of Nations under Articles 149 to 157 of the Geneva convention. The question was considered by the Council of the League of Nations in March and December 1927,[12] which approved a method of enquiry. The German representative pointed out before the Council that the legal question was not solved by the Council's action, and on December 8, 1927, Dr. Stresemann proposed that the Council should seek an advisory opinion from the Permanent Court of International Justice, but he later explained his intention that Germany should institute a suit before the court.[13] A petition of the *Deutscher Volksbund* also came before the Council on March 7, 1928,[14] but further consideration was postponed pending the outcome of the proceedings before the court.

The applicable minority clauses in both the Geneva convention of May 15, 1922, and the Minorities Treaty of June 28, 1919, include provisions for the jurisdiction of the court over disputes as to law or as to fact arising out of the articles, at the instance of any state which is represented on the Council of the League of Nations. The Polish Government had challenged the jurisdiction of the court, contending that the German position had been definitely set forth only in the German Government's reply; that "only differences of opinion as to questions of law or fact arising out of the articles which precede Article 72, and not out of those which follow it, may be referred to the court." The German Agent contended that this objection had been submitted too late, under Article 38 of the Rules of Court, which provides for the filing of "preliminary objections" to the jurisdiction. The court explained that "the object of this article was to lay down when an objection to

[10] 9 League of Nations Treaty Series, p. 465.
[11] League of Nations Official Journal, April, 1927, p. 491.
[12] *Id.*, February, 1928, p. 156.
[13] *Id.*, February, 1928, p. 159.
[14] *Id.*, April, 1928, p. 401.

the jurisdiction may validly be filed, but only in cases where the objection is submitted as a preliminary question." Repeating the statement which it has often made, the court said that its jurisdiction "depends on the will of the parties." "The acceptance by a state of the court's jurisdiction in a particular case is not, under the statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement." A distinction was drawn between those cases over which the court might have compulsory jurisdiction under Article 72 of the Geneva convention, and those questions which might be submitted to the court solely in virtue of the consent of the parties. In the present case, Poland had asked for a decision on the merits, without making a reservation as to the question of jurisdiction. Poland thereby indicated a desire to obtain a decision on the merits. It was thought, therefore, that Poland could not "later in the proceedings, go back upon that declaration." The modification of the German submissions as presented in the case, does not justify the withdrawal by the Polish Agent of the consent which had already been "implicitly given." The court, therefore, reached the conclusion "that the Polish Government has implicitly accepted the jurisdiction of the court to give judgment on the merits in respect of all the claims of the German Government and that the objection to the jurisdiction made in the rejoinder cannot invalidate the acceptance which existed at the time of the submission of the counter-case." After examining the texts of the various treaties, the court found itself "unable to accept a construction according to which the guarantee of the League of Nations as defined in Article 72 of the Geneva convention would also extend to the provisions of Division II" of the Geneva convention, so as to give foundation to the German contention that the court's jurisdiction extended to Division II.

With regard to the Polish contention that the matter had been settled by the Council of the League of Nations and that its "decision could not be subject to revision by the court," it was observed that the Council's resolution of March 12, 1927, had been taken by virtue of powers conferred upon the Council by Article 149 of the Geneva convention. The jurisdiction of the court and that of the Council are different in character. The Council clearly did not attempt to settle the question of law involved in the appeal of the *Deutscher Volksbund*. On December 8, 1927, the Council itself stated that the legal question had not been settled.

Proceeding to the merits of the case, the court concluded that Division II of the Geneva convention should be construed in the light of the stipulations of Division I, and that no construction of Division II should conflict with the provisions of Division I. The two governments were not in agreement as to the principle which determines the question whether a person belongs or not to a racial, religious or linguistic minority. Article 74 of the Geneva convention prohibits the authorities from verifying "whether a person does or does not belong to such a minority." The court reached the opinion that Poland

is justified in construing the Minorities Treaty (the provisions of which, subject to slight modifications, are embodied in Division I of the third part of the Geneva convention) as "meaning that the question whether a person does or does not belong to a racial, religious or linguistic minority . . . is a question of fact and not solely one of intention." It was the contention of the German Government that this was a question of intention alone, this being referred to as "the subjective principle." Article 74 of the Geneva convention provides: "The question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities." The court expressed the opinion that "the prohibition of verification and dispute has as its object not the substitution of a new principle for that which in the nature of things and according to the provisions of the Minorities Treaty determines membership of a racial, linguistic or religious minority, but solely the avoidance of the disadvantages—particularly great in Upper Silesia—which would arise from a verification or dispute on the part of the authorities as regards such membership."

With regard to the German contention, implying that "persons legally responsible for the education of a pupil or child have unfettered liberty 'to choose the language of instruction and the corresponding school for such pupil or child, subject to no verification, dispute, pressure or hindrance on the part of the authorities,'" for which Articles 74, 106 and 131 of the Geneva convention were relied upon, the court noted that the Polish contention was that the persons legally responsible are free "to declare what is the language of the pupil or child." The Polish Government relied upon Article 69 of the Geneva convention, and inferred that the minority language schools provided for by Article 105 of the convention are only intended for pupils of a tongue other than Polish, whose parents are also of that other tongue. In construing Article 131, the court approved the meaning given to it by the Polish Government and reached the conclusion that Article 131 "contemplates a declaration which on principle must refer to the existence of a fact and not express an intention or a wish." However, it was clearly stated that the subjective element must be taken into account, and "what is to be understood as a person's tongue is not always clear and beyond doubt."

The German Government relied upon the principle of the equal treatment of all nationals laid down by Articles 67 and 68 of the Geneva convention. But the court thought that Article 67 had no relation to the questions set out. It concluded that "a refusal to admit to minority schools children who, according to the declaration of the persons responsible for their education, only speak Polish or in respect of whom the declaration as to the child's language is lacking, cannot be regarded as contrary to the convention."

In support of the third contention of the German Government, it was alleged that the German minority schools had been in most cases organized and maintained in spite of strong opposition on the part of the Polish authorities. The court considered "that a generally hostile attitude on the part of

the authorities in regard to minority schools, an attitude manifested by more or less arbitrary action, is not compatible with the principle laid down in Article 68." But the court was not asked for a decision with regard to any concrete measure of discrimination, and since it is not denied by Poland that any measure singling out the minority schools to their detriment is incompatible with the equal treatment guaranteed by Article 68, the court found it unnecessary to pass judgment on the third of the German contentions.

The judgment of the court therefore was that: (1) the Polish objections to the jurisdiction were overruled; (2) that Articles 74, 106 and 131 of the Geneva convention "bestow upon every national the right freely to declare according to his conscience and on his personal responsibility that he does or does not belong to a racial, linguistic or religious minority and to declare what is the language of a pupil or child for whose education he is legally responsible"; but the right freely to declare what is the language of a pupil or child does not constitute an unrestricted right to choose the language in which instruction is to be imparted; "nevertheless, the declaration contemplated by Article 131 of the convention, and also the question whether a person does or does not belong to a racial, religious or linguistic minority, are subject to no verification, dispute, pressure or hindrance whatever on the part of the authorities." (3) No judgment was given on that portion of the German submission which asked a declaration that any measure singling out the minority schools to their detriment is incompatible with the equal treatment guaranteed by Articles 65, 68 and 72 of the Geneva convention.

Of the twelve judges who sat, including the two national judges, Professor Schücking and Count Rostworowski, four dissented, namely Judges Huber, Nyholm, Deputy-Judge Negulesco and Professor Schücking. Judge Huber thought that the court did not have jurisdiction to pass on the submissions in the German application, finding that the jurisdiction of the court had to be based solely on Division I of Part III of the Geneva convention. He thought that disputes as to the jurisdiction provided for under Article 36 of the statute are not necessarily preliminary pleas. He found that the court's jurisdiction was limited to Division I of the Geneva convention, and the parties had not submitted to the court the question of interpreting Articles 74, 106 and 131. The court could not derive jurisdiction from a unilateral application containing a claim outside the scope of any preëxisting jurisdiction and a reply by a respondent on the merits. Germany's application assumed the court's jurisdiction under Article 72 to extend to the provisions of Division II of the convention. It seems impossible to say that there has been a consent by the parties to the establishment of a new basis of jurisdiction, or to the adoption of a common interpretation of Article 72. "As the jurisdiction of international tribunals is almost always derived from treaties or other instruments expressly declaring the intention of the state, it is difficult to conceive that new jurisdictional powers—even in regard to a particular case only—could be indirectly inferred from the line of conduct of

agents." Judge Huber was clearly of opinion that the "absence of a plea to the jurisdiction does not create jurisdiction," and that in this case the jurisdiction of the court was to be derived solely from Article 72 of the Geneva convention.

Judge Nyholm thought that the intention of the parties to confer jurisdiction has not been sufficiently definitely expressed. A special agreement implies an agreement on the part of the two parties couched in express terms. Such definite intention is lacking in this case. Moreover, the parties were "unable to conclude an agreement regarding the court's jurisdiction. The convention, on the basis of which the suit was brought, was imposed on the parties by the Conference of Ambassadors which, amongst other things, prescribed the rules respecting jurisdiction. Germany and Poland, therefore, cannot alter or establish these rules of their own free will." Judge Nyholm concluded that Division II of the convention is subject to the court's jurisdiction, in this respect disagreeing with Judge Huber. In dealing with Article 131, Judge Nyholm found a particular state of affairs to exist in Upper Silesia: "Besides the two literary languages, Polish and German, dialects are to be found as in all countries, and even a commonly used dialect differing considerably from the Polish and German languages. The working class ordinarily and in domestic life exclusively speaks this dialect which consequently is the sole means of expression, to the exclusion of German and Polish, for children up to the time when the latter begin their school studies." Hence there are cases in which the declaration of option between German and Polish cannot correspond to the actual state of facts. Children who may not know German, may not know Polish either. Judge Nyholm examined in some detail what took place in the committee in which the convention was elaborated. He concluded that a declaration made by the parent was unimpeachable by the school authorities, and the words "school authorities" comprised "all the organs of the state which deal with school matters from the lowest to the highest."

Deputy-Judge Negulesco concurred in the judgment on the merits, but differed from the majority with regard to the question of jurisdiction. He thought that "the plea to the jurisdiction cannot be considered as submitted too late and that it can be raised at whatever state and at whatever stage of the proceedings." Poland had not, by pleading on the merits, given up her plea to the jurisdiction, "particularly when it was raised in the rejoinder and in the course of the oral pleadings as a plea joined to the merits." "The jurisdiction of the court cannot be assimilated to that of a municipal court" and "in case of doubt as to whether jurisdiction exists, it must be inferred that the court has no jurisdiction." "A tacit acceptance of the jurisdiction of the court which can be deduced merely from the documents of the proceedings is contrary to the provisions of the Statute and of the Rules of Court." He concludes that the parties were "unaware of the existence of a tacit agreement regarding the court's jurisdiction and that their mutual intention was

to abide within the limits of the jurisdiction established by Article 72, paragraph 3, of the Geneva convention."

Judge Schücking confined himself to agreeing with part of Judge Nyholm's opinion.

INTERPRETATION OF THE GRECO-TURKISH AGREEMENT OF DECEMBER 1, 1926

The treaty of peace signed at Lausanne on July 24, 1923, created a Mixed Arbitral Tribunal at Constantinople, with power to deal with disputes relating to the identity or restitution of property which the treaty required to be restored and with claims arising out of the liquidation of property under the treaty.[15] Previously, under the convention for the exchange of Greek and Turkish populations signed at Lausanne on January 30, 1923,[16] a Mixed Commission for the Exchange of Greek and Turkish Populations had been created, to supervise and facilitate emigration and to liquidate certain categories of movable and immovable property. Certain powers were also conferred on the Mixed Commission by a declaration (No. IX) relating to Moslem properties in Greece, signed at Lausanne on July 24, 1923. The Mixed Commission consists of eleven members, four named by each of the Greek and Turkish Governments and three named by the Council of the League of Nations. On December 1, 1926, an agreement was concluded at Athens by the Greek and Turkish Governments,[17] for the purpose of settling difficulties which had arisen in regard to the application of certain clauses of the treaty of peace of July 24, 1923, and the declaration of that date relating to Moslem properties in Greece. Under the terms of this agreement new powers were conferred on the Mixed Commission, which the Mixed Commission later accepted, and in a final protocol which forms part of the agreement it was provided:

> Article IV. Any questions of principle of importance which may arise in the Mixed Commission in connection with the new duties entrusted to it by the agreement signed this day and which, when that agreement was concluded, it was not already discharging in virtue of previous instruments defining its powers, shall be submitted to the President of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration. The arbitrator's awards shall be binding.

This article gave rise to differences of interpretation regarding the conditions for submission of questions to the arbitrator, and on December 22, 1927, and January 26, 1928, the Mixed Commission decided, in accordance with a suggestion made by the Council of the League of Nations on October 31, 1924,[18] to ask the Council of the League of Nations to request an advisory opinion of the court "as to the interpretation of the article in question so far

[15] For the text of the treaty, see 28 League of Nations Treaty Series, p. 12.

[16] *Id.*, Vol. 32, p. 76.

[17] *Id.*, Vol. 68, p. 13. The agreement and the final protocol were duly ratified and came into force on March 6, 1927.

[18] League of Nations Official Journal, 1924, p. 1669.

as it concerns the conditions for appeals to the arbitrator." On February 4, 1928, this decision was communicated to the Council, and on March 7, 1928, the Council decided, before placing the matter on its agenda, to approach the Greek and Turkish Governments with a view to ascertaining whether they would consent to a request for an advisory opinion.[19] Both governments having replied in the affirmative, on June 5, 1928, the Council requested the opinion sought by the Mixed Commission, "as to the interpretation of Article IV of the final protocol of the Greco-Turkish agreement of December 1, 1926, in regard to the conditions of reference to the arbitrator contemplated by that article."

The Council's request was duly communicated to all members of the League of Nations and to all states entitled to appear before the court, and notice was sent to the Mixed Commission. On June 12, 1928, the President of the court fixed July 10, 1928, as the date by which written statements of the Greek and Turkish Governments should be filed with the court, and on that date such statements had been filed. The Mixed Commission expressed a willingness to be represented, if the court should desire to hear its views, but the court considered that its representation was not required. Public hearings were held on August 6 and 7, 1928, at which oral arguments were made by M. D. Drossos, on behalf of Greece and Djémal Husni Bey, on behalf of Turkey. Neither government availed itself of the privilege accorded by Article 71 of the Rules of Court to appoint a national judge in accordance with Article 31 of the statute. The advisory opinion (No. 16) was handed down on August 28, 1928.[20]

For the purpose of defining quite clearly the scope of the question submitted to it, the court reviewed the circumstances which led to the Council's request, and particularly the proceedings of the Mixed Commission which led to the resort to the Council. Article 72 of the Rules of Court provides that "the request shall contain an exact statement of the question upon which an opinion is required," but in this case the statement in the request, if "exact," necessitated some further formulations. The court entered a *caveat* that "in the present case it is possible for the court to do this, owing to the relatively simple nature of the case; this, however, may not always be so." After an examination of the documents attached to the request, and on the basis of the definite submissions made by the Greek and Turkish representatives, the court reached "the conclusion that the differences of opinion which have resulted in the request for an opinion relate not to the question what are the conditions to which the submission of a question to the arbitrator is subject, but to the question for whom it is to decide whether these conditions are fulfilled and by whom a question may be referred to him." The Turkish view was that only the Mixed Commission might refer a question to the arbitrator, while the Greek view was that only the two governments, or, failing their agreement, either of them, might make the reference.

[19] League of Nations Official Journal, April, 1928, p. 404.

[20] Publications of the Court, Series B, No. 16.

On the basis of its conclusion, and following a precedent set in its advisory opinion No. 3, the court expressed as follows the substantial points on which it was called to give an opinion:[21]

> 1. Is it for the Mixed Commission for the Exchange of Greek and Turkish Populations to decide whether the conditions laid down by Article IV of the final protocol annexed to the agreement concluded at Athens on December 1, 1926, between the Greek and Turkish Governments, for the submission of the questions contemplated by that article to the arbitration of the President of the Greco-Turkish Mixed Arbitral Tribunal sitting at Constantinople, are or are not fulfilled? Or is it for the arbitrator contemplated by that article to decide this?
> 2. The conditions laid down by the said Article IV having been fulfilled, to whom does the right of referring a question to the arbitrator contemplated by the article belong?

In arriving at its answers to the questions before it, the court emphasized the character of the Mixed Commission, where contrary to a manner of speech prevailing, each member acts in an individual and not in a representative capacity. The duties of the Mixed Commission are essentially administrative, though it has some legislative and judicial functions. Its end is to facilitate the exchange of populations, and any interpretation which might impede its work in that field would be contrary to the spirit of the provisions creating it. The same spirit underlies all of the instruments relating to the Mixed Commission, and the court "considers that due importance must be attached to this spirit in order to arrive at a correct interpretation of Article IV of the final protocol." While that article "contains no express provision designed to settle the question by whom or when the questions with which the instrument deals may be referred to the President" of the Mixed Arbitral Tribunal, "from the very silence of the article on this point, it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the Mixed Commission when that body finds itself confronted with questions of the nature indicated." Article IV contemplates "only questions arising in the course of the deliberations of the commission." It "provides for the special reference of questions of principle of some importance to a tribunal other than the Mixed Commission and one which is regarded as better qualified than the latter to decide upon the merits of such questions of principle." The Mixed Commission alone is able to appreciate the conditions necessary, and to say whether a given question does or does not fulfil those conditions. Its action is to be taken by majority vote, and once it has decided to refer a question to the arbitrator, it will not appertain to the arbitrator to review the decision that the necessary conditions for a submission did obtain. Hence, "the court considers that a negative conflict of jurisdiction cannot arise between the Mixed Commission and the arbitrator."

The Greek arguments against this conclusion find some basis in the fact

[21] Publications of the Court, Series B, No. 16, p. 16.

that questions are to be submitted to the President of the Greco-Turkish Mixed Arbitral Tribunal "for arbitration." The court "attributes no special importance to the use of the word 'arbitration,'" which it considers "not a very happy way of expressing the idea underlying the article." There are in this instance no parties to a dispute to go before the arbitrator, and indeed it is not even necessary that there be a dispute. The text does not justify the article's being taken as an arbitration clause, which, according to the Greek contention, would imply an arbitral tribunal before which only states could be parties. Leaning toward an interpretation which would accord with the spirit of Article IV and its purpose of facilitating the work of the Mixed Commission, the court observed that its members "are not necessarily in the first place jurists," and "it is not necessarily the most suitable body for the settlement of legal questions of principles of some importance." The construction given by the court may also meet a desire of the framers of the final protocol "to secure a measure of consistency" between the decisions of the Mixed Commission and those of the Mixed Arbitral Tribunal. The court observes also that no individual member and no group either of Greek or Turkish or neutral members of the Mixed Commission can refer a question to the arbitrator; "to accord to individual members of an organization constituted as a corporate body any right to take action of any kind outside the sphere of proceedings within that organization, would be clearly contrary to an accepted principle of law." Moreover, under the instruments in force, it is the Mixed Commission, and not the Greek and Turkish Governments, which is entrusted with carrying out the exchange of populations; and it must be the commission itself that would refer any question to arbitration.

The court's unanimous opinion is, therefore, that it is for the Mixed Commission alone to decide whether the conditions enumerated in Article IV of the final protocol are or are not fulfilled, and such conditions being fulfilled, only the Mixed Commission has the power to refer a question to the arbitrator. This opinion was communicated to the Council of the League of Nations which took note of it on September 8, 1928, and ordered that it be communicated to the president of the Mixed Commission for the Exchange of Greek and Turkish Populations.

CASE CONCERNING THE FACTORY AT CHORZOW

This suit brought by the Government of Germany against the Government of Poland, was begun by an application filed with the Registry of the court on February 8, 1927. It concerns the reparation claimed by the German Government for the injury suffered by two German companies, the *Oberschlesische Stickstoffwerke A. G.* and the *Bayerische Stickstoffwerke A. G.*, in consequence of the Polish Government's taking possession of the nitrate factory at Chorzow. The action of the Polish Government had led to a previous suit between the same parties, and the court's judgment No. 6, given on August

25, 1925, had established its jurisdiction to deal with an alleged violation of the Geneva convention of May 15, 1922, while the court's judgment No. 7, given on May 25, 1926, had established that the attitude of the Polish Government in respect of the two German companies was not in conformity with Article 6 and following articles of the Geneva convention. This latter judgment of the court led to direct negotiations between the two governments which continued for six months, and when these negotiations failed to produce a settlement, the German Government instituted a second suit before the court, on February 8, 1927. The Polish Government filed a preliminary objection to the jurisdiction of the court, which was dismissed by the court's judgment No. 8 on July 26, 1927, and the case was reserved for judgment on the merits. On November 15, 1927, the German Government filed an application for a provisional measure of interim protection, which was refused by the court's order of November 21, 1927. Meanwhile, on September 16, 1927, the Polish Government had brought an action against the *Oberschlesische* company before a Polish district court at Katowice, and the progress of this action having convinced the German Government that a difference of opinion had arisen in regard to the meaning and scope of the court's judgments Nos. 5, 7 and 8, on October 18, 1927, the German Government filed an application for the interpretation of those judgments. Such interpretation was given by the court's judgment No. 11, on December 16, 1927. The present suit, therefore, was begun by the application of February 8, 1927, which had been reserved for judgment on the merits on July 26, 1927. The written proceedings were concluded on May 7, 1928, and the case was argued at public sittings of the court on June 21, 22, 25, 27 and 28, 1928. The judgment of the court, judgment No. 13, was handed down on September 13, 1928.[22]

The submissions of the two parties were extensively modified in the course of the written and oral proceedings. Such modifications were allowed by the court "in accordance with established precedent . . . subject only to the condition that the other party must always have an opportunity of commenting on the amended submissions." The court traced the submissions of both parties through the various modifications, concluding that it had to deal only with the "points of divergence" between them. The German Government claimed that the Polish Government was under an obligation to make good the injury sustained by the two companies, by paying to the German Government 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at six per cent from July 3, 1922, until the date of the judgment, for the damage caused to the *Oberschlesische* company, and 20,179,000 Reichsmarks for the damage caused to the *Bayerische* company. The Polish Government denied all liability in respect to the injury to the former company, and in the alternative asserted that the indemnity should be provisionally suspended, or that compensation should be payable only

[22] Publications of the Court, Series A, No. 17.

after the company's abandonment of its claims against Poland and the German Government's surrender of its shares in the *Oberschlesische* company; liability was admitted in respect to the injury to the latter company, but for a smaller amount than was claimed. The German Government also sought what would amount to an injunction against the export of nitrated lime and nitrate of ammonia to certain countries from Poland, and this was opposed by the Polish Government. The other German submissions opposed by Poland related to the manner of payment of the indemnity claimed and the disallowance of any set-off.

The oral proceedings developed a difference of opinion between the parties as to the nature and scope of the application. The German view was that the dispute was between the two governments, that Poland was under obligation to compensate Germany for injury to herself, and that compensation of the individuals concerned was not the object of the suit; while the Polish view was that the subject of the dispute was an alleged obligation of Poland to compensate the two companies. The court was of opinion that "the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting party to the Geneva convention." The court had reserved the case for judgment because of the "purely inter-state character of the dispute." Under international law, reparation of an injury suffered by a state may consist in "an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law." Rights of individuals violated by a state "are always in a different plane to rights belonging to a state" which the same act may infringe. Damages suffered by an individual "can only afford a convenient scale for the calculation of the reparation due to the state." Hence the court could not subscribe to the Polish view that Germany had "altered the subject of the dispute in the course of the proceedings." Germany seeks reparation for an injury to Germany, "the amount of which is determined by the injury suffered" by the two German companies.

The court felt itself called upon to deal with three questions: (1) the existence of an obligation to make reparation; (2) the existence of injuries to serve as a basis for the calculation of the amount of indemnity due; and (3) the extent of such injuries. As to (1), the court found it to be not only a principle of international law, but a general conception of law, "that any breach of an engagement involves an obligation to make reparation." It is now *res judicata*, since the court's judgment No. 7, that a breach of an international engagement has in fact taken place in this case. As to (2), the previous judgments are not conclusive. Poland admits injury to the *Bayerische* company and does not dispute the dispossession of the *Oberschlesische* company; but she denies loss to the latter company on the ground that it was not vested with ownership. Since its judgment No. 7, however, the court must deem the question of ownership *res judicata*. The conclusion

of the court has not been invalidated in any way by the judgment given by the Polish court at Katowice on November 12, 1927, on which Poland relies, and the Polish submission based on that judgment, withdrawn by Poland but maintained as a basis of a German submission, is without foundation. Poland also denies injury to the *Oberschlesische* company which may serve as a basis for the calculation of the amount of an indemnity, because all the shares in the company belonged to the German Reich and were acquired by Poland under Article 256 of the Treaty of Versailles. Germany's ownership of the shares of the *Oberschlesische* company depends on a contract of December 24, 1919, and Article 256 is the reason for a Polish submission that before any compensation should be payable Germany should hand over these shares to Poland. Germany raised a question as to the court's jurisdiction to take cognizance of a question involving the interpretation of Article 256; but "being animated by a wish to insure that full scope shall be given to the Treaty of Locarno," under which any dispute of a legal nature should be submitted to arbitration, and by a wish "to see the Chorzow case settled once and for all," Germany accepted the jurisdiction of the court for this purpose. The court found that Poland also desired it to take jurisdiction, though on what basis it had not been made clear; hence it assumed the jurisdiction. This called for a detailed analysis of Germany's relation to the *Oberschlesische* company, and the court concluded that the *Bayerische* company, rather than the Reich, controlled the *Oberschlesische* company. Nor could it find any basis in Article 256 of the Treaty of Versailles for saying that the rights possessed by the Reich under the contract of December 24, 1919, should be deducted from the indemnity claimed as regards the *Oberschlesische* company. The "property and possessions" covered by Article 256 must be "situated" in German territory ceded under the treaty, but the rights of the Reich cannot be said to be so "situated"—rights in respect of shares "if not regarded as situated where the shares are, must be considered as localized at the registered office of the company, which in this case is at Berlin and not in Polish Upper Silesia." Article 256 of the Treaty of Versailles is therefore not applicable to the rights possessed by the Reich under the contract of December 24, 1919, and Poland's submissions based on that article are rejected. Nor could the court uphold Poland's alternative request that its decision be provisionally suspended as regards the injury to the *Oberschlesische* company as a basis for calculating the indemnity, a request based on Poland's having notified the Reparation Commission of the taking over of the Chorzow factory under Article 256; for an analysis of the situation revealed no basis for doubting that "Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission if, in accordance with Germany's claim, she pays this value to that state."

As to (3), the question of the extent of the injuries admitted or found to exist, the court observed that Poland's action was "not an expropriation to render which lawful only the payment of fair compensation would have been

wanting," but a seizure of property which could not be lawfully expropriated even against compensation. Hence the reparation due is "not necessarily limited to the value of the undertaking at the moment of dispossession" with interest. Since the act was illegal, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reëstablish the situation which would, in all probability, have existed if that act had not been committed." The result of the seizure in this case was to create an "obligation to restore the undertaking and, if this be not possible, to pay its value at the time of indemnification." In the present case, since "the interests possessed by the two companies in the said undertaking are interdependent and complementary," the court concludes that a "lump sum corresponding to the value of the undertaking" would be simpler than to estimate the damages on the basis of the injuries to the two companies separately, and would give "greater guarantees that it will arrive at a just appreciation of the amount and avoid awarding double damages." For arriving at the amount of this lump sum, however, the court was not "satisfied with the data for appraisement supplied by the parties." Hence, its decision to hold an expert enquiry, and an order was issued containing directions for such an enquiry to be conducted by a committee of experts,[23] with three questions carefully framed to which answers are to be supplied. These questions, and their explanation by the court, constitute valuable criteria for the assessment of damages in international law. On receiving the answers to these questions, the court will have a knowledge of the facts which will enable it to fix the amount of compensation to which the German Government is entitled. The court then proceeds to examine whether the *Bayerische* company has suffered other injury than that sustained from the seizure of the undertaking, due, for example, to competition with its other plants; but no evidence was offered which would justify the inclusion of damages for such other injuries. Nor did the court feel itself justified in awarding the injunction against export sought by the German Government.

As to the parties' submissions concerning the conditions and methods of payment of the indemnity to be awarded, these were reserved for the judgment fixing the indemnity. But on the question of set-off, it proceeded to give its decision. Its jurisdiction being drawn in question, jurisdiction was assumed on the ground that the prohibition of set-off was demanded as an assurance of the effectiveness of the reparation to be awarded, though this must not be taken to mean that the court "might have cognizance of any question whatever of international law" merely because such question

[23] On October 16, 1928, an order was made by the President of the court, appointing as members of this Committee of Experts, MM. Emile Collett (Norway), Hans Herzog (Switzerland), and Iver Hoey (Norway). The Polish Government appointed M. Joseph Zawadzki to work with the committee as assessor, and the German Government appointed in the same capacity M. Karl Janisch. The committee held its first session at The Hague. November 10–12, 1928, and a second session was contemplated for December.

might relate to the effectiveness of the reparation sought. But Poland had raised no plea of set-off in regard to any particular claim asserted against Germany; the court could not take account of a claim of set-off made by Poland in the course of the abortive negotiations which followed judgment No. 7. Hence the court abstained from passing on the German submissions as to set-off.

The judgment of the court was not unanimous; Judges Bustamante and Altamira did not concur in certain parts of it, and Lord Finlay and national Judge Ehrlich dissented, while Judge Nyholm did not concur in the result. The judgment was adopted, however, "by nine votes to three."

On December 6, 1928, the German agent addressed a letter to the Registrar of the Court, referring to Article 61 of the Rules of Court and stating that the parties had "concluded an agreement regarding the settlement of this dispute"; and on December 13, 1928, the Polish agent addressed a letter to the Registrar in the same terms. An agreement had been reached on November 12, 1928, between the Polish Treasury and the German companies, and notes were later exchanged by the Polish Minister of Foreign Affairs and the German Minister at Warsaw, by which the two Governments agreed that "the Application now pending before the Permanent Court of International Justice at The Hague in the Charzow Case shall be withdrawn as having no further purpose." Under Article 61 of the Rules of Court, "the Court shall officially record the conclusion of the agreement"; this will doubtless be effected by a judgment or an order. It followed from the notices sent to the Court that the expert inquiry had "likewise ceased to fulfil any further purpose," and on December 15, 1928, President Anzilotti made an order terminating the inquiry and dissolving the Expert Committee. Thus the long litigation is ended by the agreement of the governments concerned, and the rôle of the Court was successful in that it helped to make an amicable result possible.

DENUNCIATION OF THE BELGIAN-CHINESE TREATY OF NOVEMBER 2, 1865

On November 26, 1926, the Belgian Government instituted proceedings before the court in a suit concerning the denunciation by the Chinese Government of the treaty between Belgium and China of November 2, 1865.[24] Orders fixing the dates for the presentation of the documents of the written proceedings were issued at various times by the court and its President, and the dates were successively extended. On February 21, 1928, the court issued an order fixing August 15, 1928, as the date for the filing of China's counter-case, October 1, 1928, as the date for the filing of Belgium's reply, and November 15, 1928, as the date for the filing of China's rejoinder.[25] On August 3, 1928, the Agent for the Belgian Government requested a further

[24] See this JOURNAL, Vol. 22, p. 1.
[25] Publications of the Court, Series A, No. 14.

extension, the request "being in accordance with the wishes of the new Chinese Government and as justified by recent events in China which have not been calculated to facilitate the negotiations for the conclusion of a new treaty, which negotiations, begun in 1927 with the government then established at Peking, must now be conducted with the new government (established at Nanking) as soon as circumstances permit." It was ascertained by the court through the Chinese Legation at The Hague that the new Government of China would have no objection to the extension requested, and on August 13, 1928, the court decided to fix the extended dates as follows: for the Chinese counter-case, February 15, 1929; for the Belgian reply, April 1, 1929; and for the Chinese rejoinder, May 15, 1929.[26]

PAYMENT OF VARIOUS SERBIAN LOANS FLOATED IN FRANCE

On May 24, 1928, the Ministers of the French Republic and the Serb-Croat-Slovene Kingdom at The Hague transmitted to the court a copy of the special arbitration agreement, concluded on April 19, 1928, by which the two governments agreed to ask the Permanent Court of International Justice to give judgment on certain questions relating to a dispute between the Government of the Serb-Croat-Slovene Kingdom and the French holders of certain Serbian bonds and shares of the Serbian Red Cross Society. It was contended by the Serb-Croat-Slovene Government that the holders of the Serbian loans should be paid on coupons falling due in French francs, whereas the French holders of the bonds and shares considered that the payment should be in gold or in foreign currencies. The court is asked to say:

> (a) Whether, as held by the Government of the Kingdom of the Serbs, Croats and Slovenes, the latter is entitled to effect in paper francs the service of its 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 loans as it has hitherto done;
>
> (b) or whether, on the contrary, the Government of the Kingdom of the Serbs, Croats and Slovenes, as held by the French bondholders, is under an obligation to pay in gold or in foreign currencies and at the places indicated hereinafter, the amount of bonds drawn for redemption but not refunded and of those subsequently drawn, as also of coupons due for payment but not paid and of those subsequently falling due for payment of the Serbian loans enumerated above, and in particular:
>
> 1. With regard to the Serbian 4% loan of 1895, whether holders of bonds of this loan are entitled, whatever their nationality may be, to obtain, at their free choice, payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due for payment, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, at Paris, London, Berlin, Vienna, Geneva and Belgrade, in the currency in circulation at one of these places;

[26] Publications of the Court, Series A, No. 16. On November 22, 1928, the two governments concluded a new treaty at Nanking.

2. With regard to the 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 loans and, subsidiarily with regard to the above-mentioned 4% loan of 1895, whether holders of these bonds are entitled to obtain payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, in gold francs at Belgrade, Paris, Brussels and Geneva, or at the equivalent value of the said amount at the exchange rate of the day in the local currency at Berlin, Vienna, Amsterdam, in so far as concerns the 1902, 1906, and 1909 loans;

3. Lastly, how the value of the gold franc is to be determined as between the parties for the above-mentioned payments.

Within a month after the delivery of the decision of the court, the Government of the Serb-Croat-Slovene Kingdom and the representatives of the bondholders are to enter into negotiations with a view to concluding arrangements which will assure to the losing party to the dispute certain concessions by the other party. If no such arrangement is made within three months of the beginning of the negotiations, either government may submit the question of the concessions referred to, and of the method of giving effect to them, to one or more arbitrators to be appointed within two months by agreement between the two governments and, failing such agreement, by the President of the Permanent Court of International Justice. The agreement further provides that the court will be asked to fix a period of two months during which the two governments may file their respective cases and an additional period of two months for the filing of counter-cases.

The court met in its fifteenth session on November 12th to deal with this question. As no judge of French nationality was sitting on the court, the Government of the French Republic appointed as its national judge, M. Henri Fromageot, stating in its communication that M. Fromageot had never been connected in any capacity with the question. As agents, the Serb-Croat-Slovene State was represented by M. Ivor Spassoievitch, and France was represented by Professor Basdevant. A public hearing was held on November 13, but was suspended on account of the illness of Deputy-Judge Negulesco. The other sitting judges met on November 19, but could not resume the hearing because of the lack of a quorum. On November 21, the President issued an order declaring the session closed. The question still remains, therefore, on the list of cases before the court.

PAYMENT OF BRAZILIAN FEDERAL LOANS CONTRACTED IN FRANCE

On April 26 and 27, 1928, the French and Brazilian Ministers at The Hague communicated to the court copies of a *compromis* signed by the two governments on August 27, 1927, the object of which is to submit to the court a dispute between the Brazilian Federal Government and French holders of various Brazilian Federal loans. The court is asked to give judgment on the following question:

> With regard to the Brazilian Federal Government's 5% loan of 1909 (Port of Pernambuco), 4% loan of 1910, and 4% loan of 1911, is payment of coupons which have matured and are not barred by prescription at this date, and coupons which shall mature, as also repayment of bonds drawn for redemption but not actually paid which are not barred by prescription on the date of the court's decision, or of bonds subsequently to be redeemed, to be effected by delivery to the French holders, in respect of each franc, of the value corresponding, in the currency of the place of payment at the rate of exchange of the day, to one-twentieth of a gold piece weighing 6.45161 grammes of 900/1000 fineness, or is such payment or repayment to be effected as hitherto in paper francs, that is to say, in the French currency which is compulsory legal tender?

The parties to the *compromis* agree to propose time limits for the submission of cases and counter-cases, two months being allowed to France and three months to Brazil in each case. The *compromis* further states that the proceedings before the court shall be conducted in French and that the judgments shall be delivered in that language, in accordance with the provisions of the Statute of the Permanent Court of International Justice. This is in accord with Article 39 of the statute of the court, which provides that if the parties agree that a case shall be conducted in a particular language, the judgment will be delivered in that language. It is also significant that Article VI of the *compromis* provides: "In estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute, the Permanent Court of International Justice shall not be bound by the decisions of the respective courts." The written proceedings in the case were completed on October 31, 1928, and, according to the terms of the *compromis*, the parties hold themselves at the disposition of the court since November 30, 1928.

JURISDICTION OF THE INTERNATIONAL COMMISSION OF THE ODER

On October 30, 1928, representatives of the British, Czechoslovak, Danish, French, German and Swedish Governments, on the one hand, and of the Polish Government, on the other hand, signed a special arbitration agreement at London for the submission to the court of a question concerning the territorial limits of the jurisdiction of the International Commission of the Oder. This commission was created under Article 341 of the Treaty of Versailles of June 28, 1929, and by Article 376 of the Treaty of Versailles provision was made for the settlement of disputes "as provided by the League of Nations." Under Article 37 of the Court Statute, this is to be interpreted to mean that the Permanent Court of International Justice is the competent tribunal. The arbitration agreement of October 30th requests the court to give judgment on the following question:

> According to the provisions of the Treaty of Versailles, does the jurisdiction of the International Commission of the Oder extend to those portions of the Warta and Netze, tributaries of the Oder, which

> are situated in Polish territory and, if so, what is the law which should govern the determination of the upstream limits to which this jurisdiction extends?

This agreement was transmitted to the registrar of the court by the British Legation at The Hague on November 29, 1928.

RESIGNATION OF JUDGE MOORE

On April 11, 1928, Judge John Bassett Moore addressed a letter to the Secretary-General of the League of Nations presenting his resignation "from the Permanent Court of International Justice." The letter stated: "The main reason for this step is the necessity of giving definite and continuous personal attention to the publication, now beginning, of a voluminous collection of all international arbitrations, ancient and modern, for which I began to gather material forty-two years ago. I present my resignation at this present moment in order that there may be ample opportunity to give the three months' notice, prescribed by the statute, for the election of my successor at the annual meeting of the Council and Assembly of the League in September next; but I desire my resignation to take effect as soon as the presence of the statutory full court, without my attendance, at the opening of the regular session, on June 15th next, is reasonably assured." Judge Moore further renounced "all claim to the pension provided for retiring members of the court." [27]

On April 24, 1928, the court directed its President to express its regret to Judge Moore, and to request his reconsideration, but in reply Judge Moore stated that he was unable to alter his decision. On May 3, 1928, the Secretary-General addressed to the members of the Council a telegram with reference to the procedure to be followed, for which the statute of the court fails to make provision. No objection to this procedure having been made, Judge Moore was informed that his resignation was accepted by the Council conditionally, subject to the Assembly's concurrence, and the Secretary-General took the measures incumbent upon him under Articles 4 and 5 of the statute to secure the nomination of candidates in view of the eventual election of a successor to Judge Moore during the next session of the Assembly. The question of the election of the successor was also placed on the supplementary list of items in the agenda of the Assembly.

It thus appears that the resignation of Judge Moore did not become formally effective, pending a decision by the Assembly itself. The matter came before the General Committee of the Ninth Assembly on September 4, 1928, and the following recommendation to the Assembly was voted: [28]

> Every member of the Assembly will doubtless regret the departure of this eminent jurist, who has rendered such distinguished services during his term at the Permanent Court of International Justice. The General Committee presumes, however, that the Assembly will share the Coun-

[27] The text is reproduced in Publications of the Court, Series E, No. 4, p. 26.

[28] Journal of the Ninth Assembly, pp. 29–30.

> cil's view that the resignation tendered must be accepted, and that an election must accordingly be held to fill the vacancy. The General Committee has no doubt that the Assembly will wish to ask the Secretary-General to convey to Judge Moore its high appreciation of his valuable services together with the expression of its deep gratitude.

On the same day, this recommendation was adopted by the Ninth Assembly, and the resignation was accepted.[29]

ELECTION OF JUDGE HUGHES

On September 8, 1928, the Assembly (ninth session) and the Council (fifty-first session) of the League of Nations proceeded to the election of a judge to fill the vacancy caused by the resignation of Judge Moore. The two bodies had before them the nominations of twenty-six persons,[30] made by the national groups in the Permanent Court of Arbitration and the other national groups provided for in Article 4 of the court's statute. Following the precedent established in 1923, when Judge Pessoa was elected in succession to Judge Barbosa, it was widely assumed that an American national would be elected to succeed Judge Moore, and the names of three Americans who had been nominated went before the Assembly and the Council: Charles Evans Hughes, Elihu Root and James Brown Scott. The Council was unanimous in voting for Charles Evans Hughes; in the Assembly, the result of the secret ballot was 41 votes for Charles Evans Hughes, 5 votes for Dr. Walther Simons (German national), one vote for Justice Sir Johannes Wilhelmns Wessels (South African national) and 1 vote for Sir Abdur Rahim (Indian national). The President of the Assembly therefore declared Mr. Hughes elected.[31] On September 10, 1928, the President announced to the Assembly the telegraphic acceptance of Judge Hughes.[32]

PROGRESS IN THE RATIFICATION OF THE PROTOCOL OF SIGNATURE OF DECEMBER 16, 1920

On July 20, 1928, the Government of Chile communicated to the Secretary-General of the League of Nations its ratification of the protocol of signature of December 16, 1920. On September 1, 1928, the protocol had been signed by fifty-two states or members of the League of Nations, of which forty-one had ratified it.[33] On February 29, 1928, Germany ratified the optional clause recognizing the court's jurisdiction as described in Article 36 of the statute.[34] On May 2, 1928, Esthonia extended for ten years the period

[29] Journal of the Ninth Assembly, p. 24.

[30] For the complete list, see League of Nations Document A. 32. 1928. V.

[31] Journal of the Ninth Assembly, p. 86.

[32] *Id.*, p. 99. See the comment by Charles Cheney Hyde, in this JOURNAL, Vol. 22, p. 822.

[33] See League of Nations Document A. 6 (a). 1928. Annex; Publications of the Court, Series E, No. 4, pp. 416 ff.

[34] For the situation on June 15, 1928, with regard to the Optional Clause, see Publications of the Court, Series E, No. 4, pp. 118–121, 416–422.

for which she had previously ratified this clause. On September 14, 1928, the optional clause was signed on behalf of Hungary for a period of five years, subject to ratification. On September 21, 1928, the optional clause was signed on behalf of Spain for a period of ten years, and the acceptance became definitive without ratification.

During the year 1928, also, the jurisdiction of the court has been extended by provisions in the following instruments:[35] Convention of Commerce and Navigation between Denmark and Spain, signed at Madrid, January 2, 1928; Treaty of Conciliation and Arbitration between France and Sweden signed at Paris, March 2, 1928; Treaty of Conciliation, Judicial Settlement and Arbitration between Denmark and Spain, signed at Copenhagen, March 14, 1928; Treaty of Conciliation, Judicial Settlement and Arbitration between Spain and Sweden, signed at Madrid, April 26, 1928; Commercial Agreement between Austria and France, signed at Paris, May 16, 1928.

The representatives of twenty-two governments assembled at The Hague, in the sixth session of the Conference on Private International Law, from January 5 to 28, 1928, agreed in the final act[36] to submit to the appreciation of their governments a draft protocol as follows:

(Translation)

> The states signatory to the present act recognize the competence of the Permanent Court of International Justice to judge any difference between them concerning the interpretation of the conventions elaborated by the Conference on Private International Law of which they are signatories or to which they have adhered. The difference will be brought before the court by a request presented by either state (*par l'etat le plus diligent*).

EXTERNAL STATUS OF MEMBERS OF THE COURT

The statute of the court (Article 19) provides that members of the court shall enjoy "diplomatic privileges and immunities" when engaged on the business of the court. The application of this provision, in so far as it concerns the position of members of the court *vis-à-vis* the Netherlands authorities, has been under consideration since the early months of 1922. At that time, the court directed that an *aide-memoire* on the subject be submitted to the Council of the League of Nations; but the Council took the view that the question should in the first place be settled in agreement with the local authorities, and that since for the moment the question seemed to arise only as concerned The Hague, it would be for the court and the Netherlands Government to come to an arrangement.[37] Direct negotiations between the officials of the court and the Netherlands authorities followed, and

[35] See Publications of the Court, Series E, No. 4, pp. 529–543.

[36] *Actes de la Sixieme Session, Conférence de la Haye de Droit International Privé*, p. 424. For the report of M. de la Vallée Poussin (*rapporteur*), see *ibid.*, p. 255. See also, Publications of the Court, Series E, No. 4, p. 530.

[37] League of Nations Official Journal, 1922, p. 568.

although various incidents of the judges' immunities were fixed,[38] no definitive comprehensive agreement was reached. On December 5, 1927, the court adopted a resolution in which it "records the impossibility of accepting the settlement" proposed by the Netherlands Government, "more especially owing to the tendency observable therein to classify the court as a Dutch institution and to the inadequate position—scarcely compatible with the court's dignity—which would be accorded to members of the court under the proposed arrangements." The resolution also "informs the Netherlands Ministry of Foreign Affairs that the League of Nations will be requested to settle the matter from an international point of view and that meantime, members of the court will maintain an attitude of complete reserve as regards invitations addressed to them which might have the effect of prejudicing in any way the settlement of the question." Accordingly, on December 13, 1927, the matter was placed before the Council of the League of Nations, in a letter in which the Registrar indicated that "the court had been actuated by the consideration that, being an institution established by the League of Nations, it was justified in seeking the aid of the League with a view to the settlement of a question which possessed an international aspect." The matter came before the Council on March 9, 1928, and the report of M. Scialoja (Italy) adopted by the Council recommended a postponement to enable the authorities on both sides to reach a solution by means of direct conversations which they had indicated a willingness to reopen.[39] Such conversations resulted in an agreement on May 22, 1928, which took the form of four "general principles" and regulations for the application. The general principles are as follows:[40]

> 1. The diplomatic privileges and immunities which in view of the terms of Article 19 of the Statute of the Permanent Court of International Justice, the Dutch authorities accord to members of the court, are the same as those which they grant in general to heads of missions accredited to H. M. the Queen of the Netherlands.
>
> The special facilities and prerogatives which the Dutch authorities grant in general to heads of missions accredited to H. M. the Queen of the Netherlands shall be extended to members of the court.
>
> For the purpose of the diplomatic privileges and immunities and special facilities above mentioned, the Registrar of the court is assimilated to members of the court.
>
> 2. In view of the terms of Article 7, paragraph 4, of the Covenant of the League of Nations, the higher officials of the court shall in principle enjoy the same position as regards diplomatic privileges and immunities as diplomatic officials attached to legations at The Hague.
>
> 3. The Permanent Court of International Justice shall occupy, in re-

[38] Particularly as regards immunity from local taxation at The Hague. See Publications of the Court, Series E, No. 4, p. 59, note.

[39] League of Nations Official Journal, 1928, p. 985.

[40] Reproduced, with the regulations, in Publications of the Court, Series E, No. 4, pp. 57–61.

lation to the Dutch authorities, a position analogous to that of the Diplomatic Corps.

When the Diplomatic Corps and the court are invited simultaneously to attend Dutch official ceremonies, the court shall take precedence immediately after the Diplomatic Corps.

4. The precedence of a member of the court of nationality other than Dutch in relation to the Dutch authorities shall be fixed as though he were an envoy extraordinary and minister plenipotentiary accredited to H. M. the Queen of the Netherlands.

The position of the Registrar of the court, in this respect, shall be the same as that of the Secretary-General of the Permanent Court of Arbitration as established by practice.

This agreement was communicated to the Council of the League of Nations, which, on June 5, 1928, took record of it and expressed "the assurance that the court will continue to possess the important status which belongs to it in virtue of the Covenant and the statute of the court."[41]

COURT QUESTIONS IN THE NINTH ASSEMBLY

In addition to the routine questions concerning the budget of the court, and to the special election of a judge to fill the vacancy caused by the resignation of Judge Moore, the Ninth Assembly considered two important questions affecting the future of the court.

On September 7, 1928, the French delegation to the Assembly, acting on behalf of the delegations of twenty states, submitted the following resolution to the Assembly:[42]

The Assembly:

Considering the ever-growing number of matters referred to the Permanent Court of International Justice;

Deeming it advisable that, before the renewal of the terms of office of the members of the court in 1930, the present provisions of the statute of the court should be examined with a view to the introduction of any amendments which experience may show to be necessary;

In view of Article 14 of the Covenant of the League of Nations, under which the Council is responsible for preparing the statute of the court with a view to its submission for approval to the Assembly;

Draws the Council's attention to the advisability of proceeding, before the renewal of the terms of office of the members of the Permanent Court of International Justice, to the examination of the statute of the court with a view to the introduction of such amendments as may be judged desirable, and to submitting the necessary proposals to the next ordinary session of the Assembly.

After having been placed on the agenda of the Assembly, the resolution was considered in the First Committee, where on September 15, 1928, it was generally agreed that "the amendments, if any, would relate only to matters of detail, in respect of which experience might have revealed possibilities of improvement,"[43] and that the agreement of all states signatory to the proto-

[41] League of Nations Official Journal, 1928, p. 866. [42] Journal of the Ninth Assembly, p. 74.
[43] *Id.*, p. 209.

col would be necessary before the amendments could enter into force. An amended resolution was considered by the plenary assembly on September 20, 1928, and adopted in the following form:[44]

> The Assembly:
>
> Considering the ever-growing number of matters referred to the Permanent Court of International Justice;
>
> Deeming it advisable that, before the renewal of the terms of office of the members of the court in 1930, the present provisions of the statute of the court should be examined with a view to the introduction of any amendments which experience may show to be necessary;
>
> Draws the Council's attention to the advisability of proceeding, before the renewal of the terms of office of the members of the Permanent Court of International Justice, to the examination of the statute of the court with a view to the introduction of such amendments as may be judged desirable, and to submitting the necessary proposals to the next ordinary session of the Assembly.

It was explained by M. Cassin, *rapporteur*, however, that the proposal was not to revise but to reëxamine the statute, "with a view to remedying certain imperfections revealed by experience."

This question was on the agenda of the Council for its fifty-third session at Lugano, and on December 13, 1928, the Council decided to set up a special committee of nine members to make an examination of the Court Statute as suggested by the Assembly.

On September 8, 1928, M. Motta, speaking for the Swiss delegation, emphasized "the importance of perhaps a more frequent and more courageous use of the advisory opinions of the Permanent Court of International Justice," and he proposed the following:[45]

> The Assembly recommends the Council to consider whether it would not be desirable to submit to the Permanent Court of International Justice, for an advisory opinion, the question whether the Council or the Assembly can, by a simple majority, request an advisory opinion under Article 14 of the Covenant of the League of Nations.

After having been placed on the agenda of the Assembly, this resolution gave rise to a spirited and protracted debate in the First Committee,[46] which turned partly on a discussion of the wisdom of the court's assimilation of its advisory action to its judicial action, and on the effect of advisory opinions after they are given. At the close of this discussion, the Swiss proponent amended the resolution, which was adopted by the plenary assembly on September 24, 1928, in the following form:

> The Assembly, noting the divergencies of opinion which exist as regards the requirements for voting in the Council or Assembly a resolu-

[44] Journal of the Ninth Assembly, p. 282. See the excellent study by Å. Hammarskjöld, "La Cour Permanente de Justice Internationale à la Neuvième Session de l'Assemblée de la Société des Nations," Revue de Droit International et de Législation Comparée, 1928, No. 6.

[45] *Id.*, p. 79. [46] *Id.*, pp. 229–231, 253–255, 293–294.

tion requesting an advisory opinion from the Permanent Court of International Justice:

Expresses the desire that, when circumstances permit, the Council may have a study made of the question whether the Council or the Assembly may, by a simple majority, ask for an advisory opinion within the meaning of Article 14 of the Covenant of the League of Nations.

This resolution was noted by the Council on December 10, 1928, but no definite action was taken.

The Ninth Assembly gave its attention also to the question of the acceptance of the optional clause of the court statute, and on September 26, 1928, the following resolution was adopted:

The Assembly, referring to the resolution of October 2, 1924, in which the Assembly, considering that the terms of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice are sufficiently wide to permit states to adhere to the special protocol opened for signature in virtue of that article, with the reservations which they regard as indispensable, and convinced that it is in the interest of the progress of international justice that the greatest possible number of states should, to the widest possible extent, accept as compulsory the jurisdiction of the court, recommends states to accede to the said protocol at the earliest possible date:

Noting that this recommendation has not so far produced all the effect that is to be desired; . . .

Recommends that states which have not yet acceded to the optional clause of Article 36 of the Statute of the Permanent Court of International Justice should, failing accession pure and simple, consider, with due regard to their interests, whether they can accede on the conditions above indicated[47] . . . .

ORGANIZATION OF THE COURT

On September 12, 1928, Judge Huber was elected Vice-President of the court in succession to Judge Weiss. The resignation of Judge Moore and the death of Judge Weiss left vacancies also in the special chambers of the court, as they had been composed for the period January 1, 1928, to December 31, 1930. On September 12, 1928, these vacancies were filled by the election of Judge Loder and Judge Altamira as members of the chamber for cases relating to communications and transit. Until the end of 1930, the composition of the chamber will be as follows: Judges Loder (President), Nyholm, Altamira, Oda, Pessoa; substitute members: Judges Anzilotti and Huber. The court also appointed Judge Oda substitute member of the chamber for cases relating to labor, in succession to Judge Moore.

Mr. Paul Reugger having resigned as deputy registrar, on August 17, 1928, Mr. Julio Lopez Olivan, formerly head of the Moroccan section of the Department of Moroccan and Colonial Affairs at the Presidency of the Council of Ministers of Spain, was chosen by the court to succeed him, to serve from January 1, 1929.

[47] League of Nations Official Journal, Special Supplement No. 63, p. 18.

THE DOCTRINE OF POSITIVE ACTS

By Guy Stevens

Member of the New York Bar; formerly Director, Association of Producers of Petroleum in Mexico

On March 27, 1928, the United States Department of State issued the following public statement:

> The petroleum regulations just promulgated by President Calles constitute executive action which completes the process beginning with the decision made by the judicial branch of the Mexican Government on November 17, 1927, and followed by the enactment of the new petroleum law by the legislative branch on December 26 last.
>
> Together these steps voluntarily taken by the Mexican Government would appear to bring to a practical conclusion the discussions which began ten years ago with reference to the effect of the Mexican constitution and laws upon foreign oil companies. The department feels, as does Ambassador Morrow, that such questions, if any, as may hereafter arise can be settled through the due operation of the Mexican administrative departments and the Mexican courts.

The controversy, so concluded, may be said to have started with the sending, by Secretary Lansing, on January 19, 1916, of the following telegram to the United States Consul at Queretaro, the then headquarters of the Carranza Government:

> Department reliably informed *de facto* authorities contemplate issuing a decree providing for the nationalization of petroleum, which, if we are correctly informed, would affect most seriously the interests of numerous American citizens and other foreigners who have heretofore engaged in the business of producing and selling petroleum in Mexico. Point out to General Carranza in unequivocal terms the dangerous situation which might result from the issuance of any decree of a confiscatory character. Request that definitive action be delayed until department shall have had opportunity to examine proposed decree, and mail copy thereof to department.[1]

No other point has ever been involved in the controversy than that alluded to in this telegram: the "nationalization of petroleum" through provisions of "a confiscatory character." The consul's reply, under date of January 26, 1916, was as follows:

> In accordance with department's wishes, subject was taken up personally with General Carranza. He informed me this morning: "The Government is not contemplating the issuance of a decree nationalizing

> the petroleum industry." This confirms statement to me by Subsecretary Rouaix.[1]

Before the end of the year in which this correspondence was exchanged, however, Carranza had convened at Queretaro a convention which drafted a new Constitution. This instrument, signed on January 31, 1917, and promulgated on February 5, 1917, contained in Article 27 the following provision, to become effective on May 1, 1917: "In the Nation is vested the *dominio directo* of all . . . petroleum." On February 20, 1917, Mr. Fletcher advised the Department of State that the Mexican Minister for Foreign Affairs had assured him:

> That the legislation emanating from the new Constitution with respect to property rights would, in his opinion, in no wise prejudice present property rights, and at the same time called attention to an article of the new constitution which provides that no laws may be made retroactive.[2]

The reference, of course, was to Article 14 of the constitution which provides: "No law shall be given retroactive effect to the prejudice of any person whomsoever." Upon receiving this assurance, Mr. Fletcher presented his credentials as Ambassador of the United States.

Although on June 28, 1917, the Mexican Minister for Foreign Affairs advised Ambassador Fletcher that the effect of the declaration of Article 27 of the new constitution was "nationalization,"[3] no definite step was taken by the Mexican Government to give effect to such "nationalization" until the following year. During 1918 Carranza, under extraordinary powers granted to him by the Mexican Congress in the Branch of Finance, issued a series of decrees, beginning with one dated February 19, 1918,[4] the effect of which, so far as they are of interest in this discussion, was to require the holders of petroleum rights to manifest and denounce their properties and to impose a royalty upon oil produced. The filing of a denouncement and the taking of a denouncement title from the Government in Mexico is analogous to the filing of a claim and receiving a title from the Government in the United States. Thus in these decrees Carranza, by requiring the taking of denouncement titles from the government and the payment of royalties, indicated that he looked upon the *dominio directo*, vested in the nation by Article 27 of the Constitution, as equivalent to ownership.

[1] Senate Documents: "Investigation of Mexican Affairs," Report of Hearings before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 66th Cong., 2d Sess., pursuant to S. Res. 106, p. 3121.

[2] *Ibid.*, p. 3152.

[3] *Ibid.*, p. 3153. "The subsoil from which the products are to be secured, and which is the basis of such contracts (for the exploitation of petroleum), does not belong, according to said law, to the owner of the surface lands, by virtue of the nationalization imposed by the text referred to."

[4] *Legislación Petrolera*, published by the Department of Industry, Commerce and Labor of the Mexican Government, Vol. I, p. 102 *et seq.*

Shortly after the first of these decrees was issued, the Department of State came into possession of an interpretation placed upon Article 27 by Pastor Rouaix, who placed the draft of this article before the Constitutional Assembly. According to him, the words, *dominio directo*,

> mean that the nation possesses all ownership in deposits of this character, both private and absolute and original . . . that the constitution having been promulgated, conflicting laws were at once repealed, thereby including, naturally, those which grant to the owner of the surface the right to deposits under the surface.[5]

With these interpretations by Carranza and Rouaix before it, the Department of State cabled instructions to the American Embassy at Mexico City, under date of April 4, 1918, to protest "emphatically and solemnly against the petroleum decree, declaring it to be an act of despoliation and confiscation."[6]

Here, then, was the manner in which was joined the issue destined to play an important part in the relations of the two governments during the succeeding ten years: The Mexican Government had definitely undertaken the "nationalization of petroleum," a matter made the subject of the United States Government's inquiry of January 19, 1916; and the United States Government had declared the plans of the Mexican Government to involve "despoliation and confiscation" as respects "American citizens who have expended large sums of money in securing petroleum lands in Mexico."

Within the following fifteen months much correspondence passed between the two governments on the subject; and Carranza, from time to time, postponed the date for compliance with his decrees. Substantially all of the foreign oil companies operating in Mexico refused to comply with their provisions which, in the view of the oil companies, involved surrender of their private titles in exchange for denouncement titles emanating from the government; and in fact, nothing of importance was done by the Mexican Government to enforce compliance with those decrees until August, 1919.

On August 1, 1919, Carranza issued a circular, officially known as Circular No. 9, in which he recited that various oil companies and individuals had failed to comply with his decrees, and provided that thereafter no drilling should be undertaken except after a permit had been obtained from the federal executive. The circular further provided that permits for the drilling of wells would only be issued to such holders of petroleum rights as would obligate themselves to comply with such petroleum law as the Congress might thereafter enact to give effect to Article 27 of the Constitution.[7]

The foreign oil companies refused to be drawn into an acceptance of "nationalization," with its attendant "despoliation and confiscation," in this manner. Drilling operations without permits were undertaken. The Mexi-

[5] Senate Investigation of Mexican Affairs, *ibid.*, p. 3154. [6] *Ibid.*

[7] *Legislación Petrolera.* Vol. I, p. 154.

can Government notified the companies that it would take over all wells drilled without permits. On November 12, 1919, it sent military forces into the oil fields and stopped all work on wells so being drilled. On November 19, 1919, Carranza issued an order refusing companies permission to take oil from wells already drilled without permits.

The United States Government continued its protests against these provisions, and some of the American oil companies opened negotiations direct with President Carranza who finally, on January 17, 1920, issued an order providing for the granting of provisional drilling permits, provisional in the sense that they would be good only until the enactment of the petroleum law by Congress.[8] It was expressly set out in the circular that neither by the issuance or acceptance of such permits would the Mexican Government or the companies waive any of the rights which they respectively claimed.

In the spring of 1920 Carranza was overthrown by a movement headed by De la Huerta, Obregon and Calles. De la Huerta became Provisional President. As soon as he had taken office, he turned his attention to the matter which was regarded as of greatest importance to the new régime, the securing of recognition from the Government of the United States. His efforts in this direction failed. He was succeeded on December 1, 1920, by Obregon.

On March 4, 1921, President Harding took office, with Mr. Charles E. Hughes as his Secretary of State. On June 7, 1921, Mr. Hughes made a public statement on the Mexican situation. He said:

> The fundamental question which confronts the Government of the United States in considering its relations with Mexico is the safeguarding of property rights against confiscation. . . .
>
> This question is vital because of the provisions inserted in the Mexican Constitution promulgated in 1917. If these provisions are to be put into effect retroactively, the properties of American citizens will be confiscated on a great scale. This would constitute an international wrong of the gravest character and this government could not submit to its accomplishment. If it be said that this wrong is not intended, and that the Constitution of Mexico of 1917 will not be construed to permit, or enforced so as to effect, confiscation, then it is important that this should be made clear by guarantees in proper form. The provisions of the Constitution and the executive decrees which have been formulated with confiscatory purposes make it obviously necessary that the purposes of Mexico should be definitely set forth.
>
> Accordingly this government has proposed a treaty of amity and commerce with Mexico, in which Mexico will agree to safeguard the rights of property which attached before the Constitution of 1917 was promulgated. . . . If Mexico does not contemplate a confiscatory policy, the Government of the United States can conceive of no possible objection to the treaty.[9]

[8] *Legislación Petrolera.* Vol. I, p. 159.

[9] From "International Conciliation," published by the American Association for International Conciliation, June, 1923, p. 417 *et seq.* Reprinted from texts furnished by the Department of State of the United States.

The Mexican Government in effect refused to enter into such a treaty. In August, 1921, the Supreme Court of Mexico rendered a decision in The Texas Company's suit for *amparo*,[10] and within the next few months followed this with four other decisions in suits filed by oil companies against the Carranza decrees of 1918 and acts of the government under those decrees. These decisions of the Supreme Court were pointed to as proof that Article 27 of the Constitution would not be applied retroactively or with confiscatory effect, and as settling the oil controversy. President Obregon, in his message to the Mexican Congress, September 1, 1922, made it clear that it was the hope of the Mexican Government "to substitute for the signing of the proposed treaty of amity and commerce . . . the development of the spontaneous political action of this government . . . until it shall consider the field sufficiently free of obstacles to be recognized."[11]

Secretary of State Hughes, however, did not consider the rendering of the five decisions of the Supreme Court of Mexico as a disposition of the oil controversy. On August 10, 1922, he gave out a statement, in part, as follows:

> The Department has received the text of four decisions of the Mexican Supreme Court rendered in May last in *amparo* proceedings instituted by petroleum companies. These four decisions seem to be identical in all essential particulars, and together with the similar decision of that court rendered August 30, 1921, in the *amparo* case brought by The Texas Company, appear to constitute what is called a precedent in Mexican jurisprudence.
>
> . . . The inference from these decisions is that petroleum properties in process of development before May 1, 1917, when the present Constitution took effect, are protected from a retroactive application of the fourth paragraph of Article 27.
>
> These decisions do not, however, effectively deal with the rights of American citizens in lands containing petroleum or other subsoil substances where the lands were owned prior to May 1, 1917, but had not been developed or as to which leases or contract rights to prospect for and work petroleum had not been granted before that date.[12]

The facts and decision in The Texas Company case were as follows: On April 28, 1917, two days before Article 27 of the new Constitution became effective, landowners named Hernandez made a lease granting to one Ravize the petroleum rights. On September 21, 1917, Ravize transferred the petroleum rights under this lease to The Texas Company. In the meantime one Cortina denounced the oil rights in this land under the Carranza decrees. A few days later the denouncement was accepted and *amparo* was filed against the acceptance of the denouncement. A little over a year later, on November 5, 1920, denouncement title was issued to Cortina, and the following month a second *amparo* was filed against the issuance of the denouncement title.

[10] From "International Conciliation," published by the American Association for International Conciliation, June, 1923, p. 457 *et. seq.* Reprinted from texts furnished by the Department of State of the United States.

[11] *Ibid.*, pp. 432 and 433.

[12] *Ibid.*, pp. 470 and 471.

The petroleum lease from Hernandez to Ravize having been executed in April, 1917, the statute of Mexico applicable to this case was the Mining Code of 1909. However, in reviewing the mining codes in force in Mexico, the Supreme Court in its opinion referred respectively to the Codes of 1884, 1892 and 1909, "which latter," said the court, "granted to the owner of the lands the right (*facultad*) freely to explore and exploit oil . . . without the necessity of a permit from any authority." Later on, when these mining codes are examined, it will be seen that none of them contains any words of grant, although the Supreme Court in its opinion uses the Spanish word *otorgada* (granted), and that in none of these codes was the word *facultad* (right) used. In the Codes of 1884 and 1909, petroleum deposits are declared to be the "exclusive property," or "of the exclusive ownership," (*propiedad exclusiva*) of the landowner; and in the Code of 1892 it was merely stated that the owner of the land might freely exploit such substances without the necessity of a special concession in any case. The code applicable to this case, to which the Supreme Court specifically refers in its opinion as having "granted to the owner of lands the right freely to explore and exploit oil," states on the contrary that petroleum deposits are of the *propiedad exclusiva* of the owner of the soil.

But notwithstanding this interpretation of the code in force just prior to the adoption of the new Constitution, the Supreme Court held that the rights (*facultades*) conceded to landowners by the law of 1909 were converted by "positive acts," so that "what the court has to deal with are rights acquired by Ravize (*derechos adquiridas*) from the date of contract which was before the new Constitution took effect"; that Ravize could legally transfer those rights and as a matter of fact did so in favor of The Texas Company; and that the issuance of the denouncement title in favor of Cortina under the authority of the Carranza decree "which presupposes the *dominio directo* of the nation in petroleum . . . certainly constitutes a retroactive application of said decree." The court had said in an earlier part of its opinion that the provision of Article 27 of the Constitution relating to petroleum "is not retroactive and does not affect pre-existing rights."

The three important points in this decision are: First, the strained interpretation put upon the mining code in force prior to the effective date of the new Constitution; second, the enunciation of the doctrine of "positive acts"; and, third, the declaration that Article 27 of the Constitution is not retroactive and does not affect rights acquired before the effective date of that instrument. The strained interpretation of the Code of 1909 was, of course, necessary to furnish a foundation for the doctrine of "positive acts"; and once the doctrine of "positive acts" was set up, the declaration that Article 27 of the Constitution is not retroactive had application to that very small portion of Mexican lands in respect to which "positive acts" *were* performed prior to May 1, 1917.

By this decision the private oil rights that existed in Mexico before the new

Constitution took effect, were divided into the two classes defined by Secretary Hughes, namely, those in lands in respect to which no "positive acts" were performed prior to May 1, 1917, and those in lands in respect to which "positive acts" were performed prior to that date. To the latter class of rights the court held that a decree "which presupposed the *dominio directo* of the nation in the petroleum" could not be applied. But, since the court arrived at this conclusion solely on the ground that the "right to explore and exploit oil, granted to the owner of the land" by the law of 1909, "became converted by means of positive acts" into "vested rights," and asserted, on the other hand, that "Paragraph 4 of Article 27 of the present Constitution which nationalizes petroleum" is "in harmony with the provisions which follow" (and which make the right to explore and exploit oil in the future dependent upon the securing of a government concession), so long as it is not applied to "vested rights," the clear implication is that all of the former class of oil rights, not having had the character of "vested rights," were wiped out by the declaration of the nation's *dominio directo* in the Constitution.

The doctrine of "positive acts" as announced by the Supreme Court in this case, was an entirely novel one. There is no such doctrine in the common law, and no such doctrine ever existed in the civil law prior to this decision. Not only do the researches, which have been conducted since this decision was rendered to discover a possible basis for this doctrine in the civil law, justify this conclusion, but it is reasonable to asume that if any such doctrine had previously existed in the civil law, the Supreme Court would have referred to it, with a citation of authority, in support of a decision having such far-reaching consequences as it must have known this decision would have.

An important feature of the court's decision setting up the doctrine of "positive acts" was its declaration that such "positive acts," in order to be effective, must have been performed prior to May 1, 1917. Therefore, when the court's decision was announced on August 30, 1921, the time, within which "positive acts" could be performed to have any effect, had expired four years and four months previously.

All through 1922 and into 1923, the negotiations which had begun shortly after Mr. Hughes became Secretary of State in 1921, by the submission to the Mexican Government of a proposed treaty of amity and commerce under which the rights of American citizens would be safeguarded, continued without result. The principal objection of the Mexican Government to the signing of the treaty was stated by that government as follows, in one of its notes:

> Paragraph Sixth of Article I provides that: "Property rights, of whatever nature heretofore or hereafter acquired by citizens of either country within the territories of the other, shall under no circumstances be subjected to confiscation, under constitutional provisions, legislation, or executive decrees or otherwise." Generally speaking, the foregoing stipulation does no more than formulate the universal

> principle of respect for acquired rights, wherewith the Government of Mexico could do nothing else than be in accord; but it contains a limitation which can not be included in an international treaty, in providing that confiscation—even if the Constitution decreed it—may not be carried into effect.[13]

Shortly after the Fifth Pan American Congress was held in Santiago, Chile, in 1923, these negotiations were suddenly cut short, by the appointment by President Harding of two commissioners, Charles Beecher Warren, former Ambassador to Japan, and John Barton Payne, former Secretary of the Interior, to go to Mexico City to confer with two Mexican commissioners for the purpose of working out a basis for the recognition of the Mexican Government by the Government of the United States. Meetings of the four commissioners continued from May 14 to August 15, 1923. In the meantime President Harding had died. Upon the return of the American Commissioners to Washington, the record of the conversations was approved by Secretary Hughes and President Coolidge, an inquiry was addressed to President Obregon in reply to which he approved the record of proceedings, and thereupon recognition was accorded.

A somewhat brief record of these proceedings made public by the Department of State indicates that at a formal meeting held August 2, 1923, the commissioners arrived at an understanding upon certain phases of the oil controversy. The Mexican Commissioners at that meeting made, on behalf of the Mexican Government, the following declarations:[14]

> I. It is the duty of the federal executive power, under the Constitution, to respect and enforce the decisions of the judicial power. In accordance with such a duty, the Executive has respected and enforced, and will continue to do so, the principles of the decisions of the Supreme Court of Justice in the "Texas Oil Company" case and the four other similar *amparo* cases, declaring that Paragraph IV of Article 27 of the Constitution of 1917 is not retroactive in respect to all persons who have performed, prior to the promulgation of said Constitution, some positive act which would manifest the intention of the owner of the surface or of the persons entitled to exercise his rights to the oil under the surface to make use of or obtain the oil under the surface; such as drilling, leasing, entering into any contract relative to the subsoil, making investments of capital in lands for the purpose of obtaining the oil in the subsoil, carrying out works of exploitation and exploration of the subsoil and in cases where from the contract relative to the subsoil it appears that the grantors fixed and received a price higher than would have been paid for the surface of the land because it was purchased for the purpose of looking for oil and exploiting same if found; and, in general, performing or doing any other positive act, or manifesting an intention of a character similar to those heretofore described. . . .

[13] Reprint of "Correspondence Exchanged between the American Embassy at Mexico City and the Mexican Foreign Office, etc.," as released for publication by the Department of State of the United States, May 8, 1926, p. 23.

[14] Proceedings of the United States-Mexican Commission convened in Mexico City, May 14, 1923. Department of State, Washington, D. C., p. 47 *et seq.*

> The above statement has constituted and will constitute in the future the policy of the Mexican Government . . . ; and the Mexican Government will grant to the owners, assignees or other persons entitled to the rights to the oil, drilling permits on such lands, subject only to police regulations, sanitary regulations and measures for public order and the right of the Mexican Government to levy general taxes.
>
> II. The government, from the time that these decisions of the Supreme Court were rendered, has recognized and will continue to recognize the same rights for all those owners or lessees . . . who are in a similar situation as those who obtained *amparo*. . . .
>
> III. The Mexican Government, . . . has granted and grants preferential rights to all owners of the surface or persons entitled to exercise their preferential rights to the oil in the subsoil, who have not performed a positive act such as already mentioned, . . . so that whenever those owners of the surface or persons entitled to exercise their preferential rights to the oil in the subsoil wish to use or obtain the oil in the said subsoil, the Mexican Government will permit them to do so to the exclusion of any third party who has no title to the land or to the subsoil.

Therein the Mexican government recognized the true import of the decisions of the Mexican Supreme Court in The Texas Company and other *amparo* cases in so far as "positive act" lands were concerned, namely, that the constitutional declaration of *dominio directo* had no application to such lands, and that the holders of petroleum rights in such lands were entitled to permits to operate, subject only to regulations of a police nature.

With respect to lands upon which "positive acts" had not been performed, the Mexican Government agreed to recognize "preferential rights"; and inasmuch as this was not a complete recognition of the rights claimed by American citizens, the American Commissioners reserved "all the rights of citizens of the United States in respect to the subsoil . . . under the laws and Constitution of Mexico in force prior to the promulgation of the new Constitution, May 1, 1917, and under the principles of international law and equity." [15]

Notwithstanding these declarations on the part of the Mexican Government, and the resumption of full diplomatic relations between the two countries, the petroleum industry continued in a state of difficulty and uncertainty, and production steadily declined. In an effort to get this unfortunate controversy finally disposed of in a practical way, a committee representing the principal foreign oil companies went to Mexico in September, 1924, and spent nearly a month in conference with officials of the Mexican Government. As a result of those conferences, a working arrangement was agreed upon. It had the merit of a practical plan for the encouragement and revival of the industry in which both the companies and government were interested, and avoided all controversial questions. Following the return of the oil companies' committee to New York, the plan was approved

[15] Proceedings of the United States-Mexican Commission convened in Mexico City, May 14, 1923. Department of State, Washington, D. C., p 49.

by the companies and also by President Obregon. Shortly after President Calles took office on December 1, 1924, the plan was also approved by him.

The next event was the introduction into the Mexican Congress in September, 1925, of a proposed petroleum law vitally at variance with the Mexican declarations of 1923 and the mutually accepted plan of 1924. At about the same time there was introduced into the Mexican Congress a bill relating to the right of foreigners to hold property interests in Mexico, a bill which was finally enacted into law and is known as the Alien Land Law.[16] The United States Government addressed inquiries to the Mexican Government concerning the meaning and interpretation of these laws; and there followed a somewhat voluminous correspondence between the two governments, extending from an *aide memoire* presented by the American Ambassador on November 17, 1925,[17] to the final note of the Mexican Minister for Foreign Affairs dated November 17, 1926.[18] While this correspondence was being carried on, both the alien land bill and the petroleum bill were enacted into law.

The Petroleum Law, following the decisions of the Mexican Supreme Court in The Texas Company and other *amparo* cases, recognized no petroleum rights whatever in any lands in respect to which "positive acts" had not been performed prior to May 1, 1917. In respect to positive act lands, it contained three particularly important provisions. In the first place, although the Mexican Commissioners in 1923 had declared that the "performing or doing any . . . positive act or manifesting an intention" to exercise the rights to the oil was sufficient to bring any land within the doctrine laid down by the Mexican Supreme Court, the Petroleum Law recognized only two "positive acts": the actual beginning of petroleum exploitation works prior to May 1, 1917, and the making of contracts before May 1, 1917, by the surface owner for express purposes of petroleum exploitation. In the second place, the law provided that even those who by virtue of the performance of *such* "positive acts" were recognized as having some petroleum rights, must within one year from the promulgation of the law apply for "confirmation" of those rights which, however, would be granted in the form of concessions and for not more than fifty years computed from the date of the performance of the "positive act." The third feature of the law was that those failing to apply for "confirmation" of their rights within one year, would at the expiration of the year be deemed to have renounced their rights.

[16] *Diario Oficial*, January 21, 1926.

[17] Reprint of "Correspondence exchanged between the Governments of the United States and Mexico, regarding the Two Laws regulating Section 1 of Article 27 of the Mexican Constitution," as released for publication by the Dept. of State of the United States on April 10, 1926, p. 3.

[18] Reprint of "Correspondence between the Governments of the United States and Mexico," as released for publication by the Department of State of the United States on November 24, 1926, p. 33.

After numerous conferences and communications with the Mexican Government, the principal oil companies decided on December 27, 1926, that they would not apply for such "confirmation"; and the year allowed by the law for doing so expired on December 31, 1926.

Early in 1927 the situation which had prevailed during the term of Carranza in 1919 was substantially duplicated. Drilling permits were refused to those who had not complied with the law, drilling permits issued to them before the expiration of the previous year were cancelled, and drilling operations conducted without drilling permits were stopped by military force. As before, the oil companies affected filed suits of *amparo* against the various acts of the government; and on November 17, 1927, the Mexican Supreme Court announced a decision in one of these suits instituted by the Mexican Petroleum Company of California.[19]

In this case were involved all of the points of outstanding importance arising under the law. To specify: The company claimed its constitutional rights to be violated (a) because the law did not recognize its petroleum rights in land on which "positive acts" were not performed prior to May 1, 1917; (b) because its rights to the petroleum in the subsoil were based on private titles acquired in accordance with the laws in force prior to May 1, 1917, whereas the company was now required to secure its rights through a concession from the government; (c) because under the Constitution of Mexico the company, being a foreign corporation, could not receive or hold a concession for the exploitation of petroleum; (d) because if it could and did apply for and receive such a concession, the concession would be limited to a period of fifty years from the date of the performance of the "positive act," whereas its private titles in respect to lands held in fee were of unlimited duration; and (e) because of the threat of forfeiture contained in the law.

On each of these points the Government of the United States had made its position clear. With respect to rights in lands upon which no "positive acts" had been performed prior to May 1, 1917,the Department of State had said in its note of January 8, 1926,[20] that prior to the adoption of the present Constitution "Mexican law expressly provided that the owner of surface lands owned also the subsoil of deposits of petroleum," and, in its note of July 31, 1926,[21] that "it has been and is the position of my government . . . that the surface owner in these cases is the owner of certain subsoil deposits including petroleum." And in the same note, the Government of the United States refers to the requirement of "positive acts" as "a position which has . . . never been conceded by my government." In respect to the requirement of seeking a "confirmation" in the form of a concession for not

[19] English translation of this decision is printed in this JOURNAL, Vol. 22, p. 421.

[20] Correspondence between the Governments of the United States and Mexico, released April 10, 1926, p. 18.

[21] Correspondence between the Governments of the United States and Mexico, released Nov. 24. 1926.

exceeding fifty years, the Government of the United States said in its note of January 28, 1926,[22] that "the exchange of a present title for a concession having a limited duration does not confirm the title." In its note of July 31, 1926, it said: "The use of the word 'confirmation' in this relation is, to say the least, misleading." In the same note, the Secretary of State, referring to the Mexican Law of Waters of 1910, which the Mexican Government asserted provided for a procedure analogous to that provided in the petroleum law, said: "I find there no suggestion of a change in the nature of the title." The United States Government had also pointed out to the Mexican Government the inability of a foreign corporation to hold a concession for the exploitation of petroleum; had called attention to the limited number of "positive acts" enumerated in the law as compared with those enumerated by the Mexican Commissioners at the conferences in 1923; had referred to the fact that the Supreme Court of Mexico in TheTexas Company and other *amparo* cases "definitely decided" that lands upon which "positive" acts had been performed prior to May 1, 1917, "were not affected by the Constitution"; and adverted to the provision that unless "confirmation" were applied for within a year, the rights would be forfeited.

The Supreme Court in its decision in the Mexican Petroleum Company case apparently affirmed the doctrine of "positive acts," for it clearly intimated, in the fourth paragraph of its opinion, that the complainant company had rights only "provided that the requirements laid down by fractions 1 and 2 of Article 14 (of the law, defining 'positive acts') . . . are complied with." The court nowhere in its opinion referred to a "confirmation" in the form of a concession. It did say that it was proper for the government to require a confirmation in order that it could have a record of the rights claimed; but it nowhere in its opinion speaks of a concession, or holds that the requirement of taking out a concession, as a means of "confirmation," is a proper one. The court completely ignored the point that the Mexican Petroleum Company as a foreign corporation could not, under the Constitution, obtain or hold a concession for the exploitation of petroleum. The court did hold, and this is the point of importance in the decision, that the limitation of the company's fee right to a right not exceeding fifty years, was a violation of the company's constitutional guarantees, and that the company had not forfeited its rights by reason of its failure to apply for something which it was not called upon to accept in lieu of its perpetual private rights.

Shortly after this decision was announced by the Supreme Court of Mexico, the President of Mexico, without any opportunity having been afforded to the Government of the United States or to the oil companies to express their views regarding appropriate amendments to the petroleum law, sent to the Congress some proposed amendments which were speedily enacted into law. The changes effected by these amendments were as follows: Instead of pro-

[22] Correspondence between the Governments of the United States and Mexico, released April 10, 1926, p. 30.

viding that the rights in lands in respect to which the "positive acts" specified in the law had been performed should be "confirmed" by the *granting* of *concession for not more than fifty years*, the law now provided that those rights should be "confirmed" by the issuance of confirmatory concessions, and that these "confirmations" should be *granted* "without limitation as to time" in the case of surface owners, and "for the term stipulated in the contracts" in the case of rights held under petroleum leases. Thus, instead of a "concession," the law now provided for a "confirmatory concession"; instead of providing that the concessions should be "granted," it now provided that they should be "issued," although it also provided that the "confirmations" should be *granted*, and the limitation of time was removed.

Following the promulgation of these amendments to the law, a committee of the representatives of the principal oil companies in Mexico City requested of the government permission to submit suggestions for amendments to the petroleum regulations. It should be understood that the scheme of laws in Mexico is substantially the same as the scheme of laws in the United States. In each country there is the Constitution; next there are the laws enacted by the Congress to carry into effect the provisions of the Constitution, which in Mexico are called organic or regulatory laws; and finally, there are executive regulations for the detailed administration of a law passed by Congress.

The request of the oil companies' representatives was granted; and in February they submitted detailed suggestions. Under date of March 6, 1928, the Department of Industry, Commerce and Labor, through the Minister, Mr. Morones, replied to the committee practically rejecting its suggestions *in toto*. Some of the observations of the Minister in this reply are interesting. He says that "the confirmations under Article 12 (of the law relating to the confirmation of rights under previous concessions from the government) are not a full recognition of rights existing prior to May 1, 1917, but only the substitution of present concessions for concessions granted under prior laws." In another place, in reference to a suggestion by the committee that the purchase of land by an oil company should be considered as having been made for petroleum purposes, he said: "Even if such were the case, the purchase would reveal the intention but not the exercise of the right," thus indicating the view of the government that merely "manifesting an intention," which the Mexican Commissioners in 1923 declared would be sufficient, is of no effect, that the right must actually be exercised, that is, one of the definite "positive acts" specified in the law must have been performed. He also said, in reply to a suggestion of the committee that a "positive act" actually performed should extend to the whole of a continuous tract of land held by the same party: "This cannot be accepted . . . the extension of works executed can only be determined in each case in accordance with the circumstances thereof." This means, of course, that the government reserves to itself the right to determine whether, for example, a well drilled in one corner of a tract of land containing a thousand acres created vested

rights to the oil in the entire tract of land or only in the comparatively infinitesimal portion thereof occupied in the drilling and operation of that well.

The amended regulations were issued on March 27, 1928, and their issuance was the occasion for the official pronouncement of the Department of State quoted at the beginning of this article.

It was not, of course, within the authority of the executive to issue regulations which would not harmonize with the law in any points upon which the law itself was specific, any more than it would be within the authority of the executive of the United States, in issuing income tax regulations, to provide for a personal exemption of $5,000 when the law itself specified a maximum exemption of $3,500. But there were certain points of some importance upon which the law was silent, and it was within the competency of the executive in issuing regulations to resolve those points definitely, provided it be done in a manner which would not be inconsistent or out of harmony with the law itself. In most of such cases the points were resolved in the regulations in the manner showing the least consideration for the views of the companies, or were not resolved definitely at all, which was scarcely less satisfactory. The regulations did in one respect meet the views of the Government of the United States and the oil companies in general terms, by incorporating the definition of "positive acts" contained in the declaration of the Mexican Commissioners at the conference on August 2, 1923; although the Department of Industry, Commerce and Labor had rejected suggestions by the representatives of the oil companies in Mexico City to enumerate certain specific things which would constitute "positive acts." It is doubtful, however, whether either the incorporation of the broader definition in general terms, or the refusal to specify certain acts, is of any material importance; for in the law itself, within the four corners of which is definitely circumscribed the legal scope of regulations, the effective "positive acts" are definitely specified and limited to two. Certain it is that whatever reasonable promise the incorporation of a broad definition of "positive acts" in the regulations may offer that the companies will have their petroleum rights recognized, it is no greater than the promise held out by that same general definition as incorporated in the declaration of the Mexican Commissioners in 1923; and in the meantime the United States Government had called attention to the limited number of "positive acts" specified in the law and had been able to elicit from the Mexican government no further reply than that the "positive acts" enumerated in the decisions of the Supreme Court and the declaration of the Mexican Commissioners in 1923 "are precisely those stated in Article 14" of the petroleum law.

Without undertaking to specify and explain all important points as they now stand under the "practical conclusion" reached, the situation at present with respect to some of the most important points is as follows:

A. The Mexican Government recognizes no private oil rights whatever in

any lands in respect to which "positive acts" were not performed prior to May 1, 1917, although the Government of the United States had asserted in its note of July 31, 1926,[23] to the Mexican Government that "an analysis of the mining laws of 1884, 1892 and 1909 has convinced my government that by the very terms of these statutes American nationals who acquired lands prior to May 1, 1917, whether by fee ownership or leasehold, obtained not a mere optional right to the oil deposits contained therein but the 'exclusive property' and hence a vested interest in such deposits."

B. Although the definition of "positive acts" is contained in broad general language in the regulations, the law limits the number of effective "positive acts" to two.

C. There is no certainty—the determination of this question is reserved by the Mexican Government to itself—how much of any given area of land is affected by a "positive act" performed on any part thereof.

D. Those holding petroleum rights in "positive act" lands must on or before January 11, 1929, apply for "confirmation" in the form of "confirmatory concessions," under penalty of complete forfeiture. In view of the Mexican Supreme Court decisions, that the provisions of Article 27 of the Constitution in the Branch of Petroleum could not be applied to such lands, it may well be asked by what authority such lands are now brought within the provisions of a law regulating Article 27 of the Constitution in the Branch of Petroleum.

Into the discussions of the Mexican oil controversy there has been injected much in reference to the legal status of petroleum under the Spanish régime and under Mexican independence up to 1884, and under the statutes in force in Mexico between 1884 and May 1, 1917. There has been evidence of much confusion not only as to what laws were in force during some of these periods, but as to the meaning of some of the laws, and also as to the bearing which the various provisions in force prior to May 1, 1917, may have upon Mexico's legal and moral right to nationalize petroleum in the subsoil.

One evidence of this confusion is found in the fact that the conclusions arrived at as a result of one or another interpretation of those former laws are applied without distinction to the two classes of petroleum rights, namely, those in lands in respect to which no "positive acts" were performed prior to May 1, 1917, and to "positive act" lands themselves. So far as rights in "positive act" lands are concerned, any discussion of the laws in effect prior to May 1, 1917, is of only academic interest and of no importance whatever, because the Supreme Court of Mexico has held unequivocally that where "positive acts" were performed prior to the effective date of the new Constitution, "acquired" or "vested" private rights were established in the petroleum deposits. No matter, therefore, what theory may be held respecting

[23] Correspondence between the Governments of the United States and Mexico, released Nov. 24, 1926, p. 3.

the laws in force in Mexico prior to May 1, 1917, it cannot furnish a justification for the "nationalization" of petroleum in "positive act" lands.

It is solely upon the petroleum rights held, or claimed to be held, in lands in respect to which no "positive acts" were performed, that the discussion of earlier laws can possibly have any bearing.

As far back as the fourteenth century, ordinances were issued by the Spanish kings with reference to subsoil products. None of these, however, is of present importance until we come to a decree issued by Charles III in 1780,[24] virtually declaring coal deposits to belong to the Crown and opening them up to denouncement. Three years later, in 1783, Charles III issued royal mining ordinances for New Spain (Mexico).[25] In those ordinances the King declared:

> The mines belong to my royal crown. . . . Without separating them from my royal patrimony, I concede them to my vassals in ownership (*propiedad*) and possession, in such manner that they may sell, lease, devise and in any other manner alienate the right which they hold thereto. . . . Any person shall have the right to discover and denounce a mine or a vein, not only on common lands but also on those privately owned, provided he pays to the owner of the land for the surface occupied and for the damage resulting, a compensation fixed by the appraisal of experts. . . . I also concede permission to denounce in the manner referred to, not only mines of gold and silver but also . . . all other fossils be they ores or minerals, bitumens or juices of the earth.[26]

The declaration that coal deposits were part of the royal patrimony and could therefore be denounced, evoked a spirited discussion in Spain, with the result that in 1789, six years after the royal mining ordinances for New Spain were promulgated, Charles III issued another decree declaring that "whereas coal is neither a metal nor a semimetal . . . those mines shall belong to the owners of the lands in which they are situated."[27] So completely was the King convinced that coal deposits (being neither metal nor semimetal) did not properly constitute a part of the royal patrimony, that in 1792[28] and 1793[29] he issued two further decrees in which he declared that the owners of lands on which coal mines were situated could operate, lease or sell said mines at their pleasure "without any other permission or formality than that which would be necessary for operating, leasing or selling the land in which they are situated."

The first question about which there has centered a great deal of discussion is whether the decree of 1789 repealed or modified with respect to substances that were neither metals nor semimetals, the provision in the royal mining

[24] *Novisima Recopilación*, Book IX, Title XX, Law I.

[25] *Reales Ordenanzas Para la Mineria de la Nueva España*, Title 5, Art. 1. See *Legislación Petrolera*, Vol. I, p. 2.

[26] *Ibid.*, Title 6, Art. 22, *loc. cit.*, Vol. I, p. 6.

[27] *Novisima Recopilación*, Book IX, Title XX, Law II.

[28] *Ibid.*, Law IV.

[29] *Ibid.*, Law VI.

ordinances for New Spain which would seem to have opened up these substances, as well as others, to denouncement. Opinions upon this point have differed. When, about fifty years ago, there was considerable activity in Mexico in connection with coal deposits, some very learned lawyers and jurists maintained that the decree of 1789 did modify the mining ordinances for New Spain in this respect. Others maintained that it did not; and in an opinion written in 1882 by Judge Vallarta, in a case in which the denouncement of a coal deposit was involved, a majority of the court concurred in an expression of opinion that the decree of 1789 did not modify the royal ordinances for New Spain or have any force in Mexico.[30] However, at about the same time the Board of Legislation in Mexico declared that "it appears incontrovertible that coal is not now, and has not been in the past, subject to the rules governing the working of metals." Even down to 1905, when the subject was under discussion in the Academy of Jurisprudence in Mexico City, some of the most able of the lawyers declared that the decree of 1789 was general in its application and therefore was effective in Mexico as well as elsewhere in the kingdom. Whatever view may be held on this point, it must be and is admitted that there is nothing in the decree of 1789 in the way of a declaration that it is not applicable to New Spain. On the other hand, the fundamental question involved, whether it concerned the status of coal in Spain or in New Spain, was whether or not coal deposits constituted a part of the royal patrimony. And six years after the King had declared in the royal ordinances for New Spain that they were a part of the royal patrimony, he declared that those substances that were "neither metals nor semimetals" were not a part of the royal patrimony. It would seem that a declaration on the fundamental questions as to what was or was not included in the royal patrimony must, in the very nature of things, have application throughout the territories of the Crown.

The next question encountered in this discussion is the effect of the new Spanish Constitution of 1812 upon the royal ordinances for New Spain, assuming that they were still on that date in force in Mexico in their original form. The new Spanish Constitution applied to all parts of the kingdom, including Mexico, and the citizens of all parts of the kingdom were put upon a basis of strict equality with respect to all political and civil rights. Many able Mexican lawyers have contended that if the royal ordinances of 1783 were still in force in Mexico in their original form at the time of the promulgation of this new Constitution, they thereby, in any event, were superseded by the laws of property in force in the peninsula of Spain.

In view of the unsettled state of the law and of the fact, which seems to have been generally recognized, that the several states, and not the federal government, were the successors of the Crown in the royal patrimony, the

[30] *Votos de Vallarta*, Vol. 2, p. 140. "*Amparo* applied for against the decision of a civil judge who declared that the denouncement of a coal mine situated on land owned by another party is legal."

Constitution of Mexico was amended in 1883 [31] so as to authorize the Federal Congress to enact a mining code which would be effective throughout the republic. Under the authority of this constitutional amendment, the first Mexican mining code was promulgated in 1884.[32]

This Law of 1884 specified in Article 1 the substances that were "subject to this code," and in Article 10 declared other substances, among which were coal and petroleum, to be the "exclusive property" or of the "exclusive ownership" (*propiedad exclusiva*) of the landowner. There were no words of grant in this code. The words are simply declaratory.

In 1892[33] this code was superseded by another one, which in Article 3 specified the substances for the exploitation of which a concession was necessary, and in Article 4 declared that the owner of the soil might exploit certain substances, among which were specified the mineral fuels, "freely and without the need of a special concession in any instance." This law made no declaration inconsistent with the declaration of private ownership of petroleum contained in the Law of 1884. Efforts have been made to attach significance to the different words used in the Law of 1892, and it has been said that this new law "was open to the construction" that it took from the landowner any ownership in the petroleum deposits and left him merely with a privilege to exploit such substances. This strained construction could only, of course, be predicated upon words which the law does not contain. The law contains no words remotely resembling any declaration of a change in the ownership of these deposits upon which any such construction could be predicated. The legislators, in drafting the Law of 1892, undoubtedly assumed that the question of ownership with respect to which there had been different opinions prior to 1884, had been once and forever settled by the declaration contained in that law.

In 1909 another mining code superseded that of 1892. This law,[34] in its Article 1, declared certain substances (and the words used in this law are of interest) to be of the *dominio directo* of the nation, and in its Article 2 the law declared other substances, including the deposits of mineral material, to be the "exclusive property" or of the "exclusive ownership" (*propiedad exclusiva*) of the landowner. The return to the use of the words *propiedad exclusiva* in this law is susceptible of easy explanation. By the year 1905 coal and petroleum had become substances of considerable importance in Mexico, and the Department of Promotion submitted to the Academy of Jurisprudence in Mexico City for its opinion this question: "Can deposits of coal and petroleum, whether in lands of private ownership or otherwise, be declared open to denouncement?"[35] The prevailing opinion among the

[31] Law of Dec. 14, 1883, amending Sec. X of Art. 72 of the Constitution of 1857.

[32] *Código de Minas de los Estados Unidos Mexicanos*, Nov. 22, 1884.

[33] *Ley Minera de los Estados Unidos Mexicanos*, June 4, 1892.

[34] *Ley Minera de los Estados Unidos Mexicanos*, Nov. 25, 1909.

[35] *Estudios Juridicos; Petroleo y Carbon de Piedra. Academia de Jurisprudencia y Legislación*, (1905). Mexico, 1921.

lawyers in the Academy was that coal and petroleum deposits were the absolute property of the landowner and could not be made subject to denouncement. But the mere fact that this question had again arisen furnishes an understandable reason for the legislators again using the words *propiedad exclusiva* in the Law of 1909.

It has already been pointed out that the Supreme Court of Mexico in its decision in The Texas Company *amparo* case, while purporting to state the provisions in the Law of 1909, which was the law applicable to the case, in fact ignored the words *propiedad exclusiva* in that law and cited instead the words of the Law of 1892.

And there is another point which should be observed in connection with these laws, and particularly with reference to the Law of 1892. If a mineral deposit of this nature belongs to the sovereign or the state and is open to denouncement, it is open to denouncement by anyone who wants to denounce it. However, these laws, including the Law of 1892, left the right to exploit petroleum wholly with the landowner. No one of the laws made any provision for the exercise of that right by anyone else under any circumstances.

It would seem that the meaning of these laws and their effect were clear; that under them the petroleum deposits were the property (*propiedad*) of the landowner; and, as one of the members of the Academy of Jurisprudence said in 1905: "Property is an acquired right which cannot be destroyed by any subsequent law." [36]

Certain it is that large amounts of capital were invested in petroleum deposits in Mexico on the faith that these laws meant what they seemed to mean, and certain it is also that at no time during the thirty-two years that these laws were in force did the government by any act indicate to those who had put their money into such petroleum deposits that the rights they had therein were anything less than full ownership.

Attention has already been called to the specific words used in the Mining Law of 1909. Under this law, as under the two previous ones, subsoil substances were divided into two classes: those in which the landowner merely by virtue of his ownership of the land had no rights; and those over which the landowner, by virtue of his ownership of the land, held exclusive rights. After defining these two classes, the code in each case is devoted to setting forth the procedure and requirements relating to the development of the substances of the former class. The words used with respect to this former class in the Law of 1909 happened to be precisely the words which seven years later were used in Article 27 of the new Constitution, that is, the substances of this class were declared to be of the *dominio directo* of the nation. This throws an interesting light upon the correct interpretation of the words *dominio directo*, about the meaning of which much erudition has been wasted. The words *dominio directo* as used in the Law of 1909,

[36] *Estudios Juridicos; Petroleo y Carbon de Piedra. Academia de Jurisprudencia y Legislacion*, (1905). Mexico, 1921, p. 63.

whatever their origin and technical meaning may be, are used to express such a control, dominion or ownership in the nation as is wholly inconsistent with any rights in the landowner merely by virtue of his ownership of the land. This is quite in accord with the information received by the Government of the United States in 1917 of the interpretation which the draftsman of Article 27 of the new Constitution put upon these words as used in that instrument. The draftsman's views on this point were more fully set forth in the reply which he, as the then Secretary of Industry, made to an inquiry addressed to him by certain proponents of a bill for the regulation of Article 27 of the Constitution in the Branch of Petroleum, introduced in the Mexican Congress late in 1917. He said:

> In dealing with the products of the subsoil, the constituent Congress desired to be still more specific as regards the rights of the nation and therefore employed the words *dominio directo* by which it was clearly expressed that in resources of this class the nation held not only the original and absolute ownership (*propiedad*) but that the private ownership (*propiedad privada*) thereof likewise pertains to the nation.[37]

Such also has been the interpretation placed upon the words *dominio directo* definitely by the Supreme Court of Mexico and the Mexican Congress, for under the decisions of the Supreme Court in The Texas Company and other *amparo* cases, and under the new petroleum law enacted by the Mexican Congress, the landowner as such has no rights of any degree or nature in the petroleum deposits in any lands in respect to which "positive acts" were not performed prior to May 1, 1917.

As the matter now stands, therefore, under the decisions of the Supreme Court of Mexico, and the petroleum law and regulations which the Department of State announces have brought to a "practical conclusion" the discussions between the two governments over the petroleum rights acquired by American citizens in Mexico prior to May 1, 1917:

I. The nation, as opposed to private individuals, is declared to be the holder of all petroleum rights in lands in respect to which "positive acts" were not performed before May 1, 1917; and

II. The petroleum rights acquired before May 1, 1917, in lands in respect to which "positive acts" were performed, are required to be brought within the terms of a law which its title affirms is a law to regulate the *dominio directo* of the nation in petroleum deposits; and their further exercise after January 11, 1929, is conditioned upon the holders thereof making application before that date for "confirmatory concessions."

[37] U. S. Senate Investigation of Mexican Affairs, p. 3154.

THE DOCTRINE OF RES JUDICATA IN NATURALIZATION CASES IN THE UNITED STATES

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With nationality problems continuing to occupy a prominent place in both international and municipal practice, expressions of opinion of our highest tribunal upon the subject are received with peculiar interest. This is particularly true where the rule announced is one which governs the validity of naturalization judgments. In a recent sweeping naturalization decision which upholds the government's views at every point, the United States Supreme Court has again stressed the rule that when doubt exists concerning a grant of citizenship, the statutes must be strictly construed in favor of the United States and against the alien. On October 22, 1928, the court handed down its opinion in the case of Anna Marie Maney, Petitioner, *v.* The United States of America,[1] in which it affirmed, on writ of *certiorari*, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit.[2] The latter court had directed the cancellation of the applicant's certificate of naturalization as having been "illegally procured" because of her failure to file, at the prescribed time and in the required manner, the certificate of her arrival in the United States.

The applicant had been naturalized and citizenship certificate had been granted to her on February 11, 1924, by the United States District Court for the Eastern District of Wisconsin, over the objection of the United States. Her petition for naturalization had been filed November 13, 1923, in the same court. Having arrived in the United States after June 29, 1906, she was required by the Act of that date [3] to support her petition *at filing* with a certificate from the Department of Labor showing the date, place and manner of her arrival in the United States. This latter certificate was not actually issued by the department from the immigration records until November 24, 1923. Furthermore, it was not transmitted to the clerk of the naturalization court until December 3, 1923, twenty days after the filing of the petition

[1] No. 27, October Term, 1928; 49 S. Ct. 15 [Advance Sheets].

[2] United States *v.* Maney (1927), 21 F. (2d) 28.

[3] Subdiv. 2, Sec. 4, Act of June 29, 1906; 34 Stat. 596, 597 (U. S. C. Title 8, Sec. 380), which provides in part: "At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of . . . Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, . . . which certificate . . . shall be attached to and made a part of said petition."

to which it was required to be attached. Though other provisions of the statute of 1906 require ninety days' public posting after the filing of the petition before final action may be taken by the court,[4] final hearing was held in her case on February 11, 1924. This was within seventy days of the transmittal of the certificate of arrival to the clerk of court. At the hearing, the trial court undertook to cure by a *nunc pro tunc* order the failure to comply with the requirement as to the time when the certificate of arrival must be filed and attached to the petition. This order directed that the certificate be filed and attached as of the date when the petition was filed.

The government did not seek review of the case by appeal under the Circuit Court of Appeals Act of 1891, as amended,[5] although it might have availed itself of that method. Instead, in June, 1925, after the period for appeal had passed, it initiated a proceeding in the same District Court by an independent suit under Section 15 of the Act of 1906,[6] to cancel the naturalization as having been illegally procured. The ground relied upon was the failure to observe the certificate of arrival requirement. As was to be expected, the District Court held against the United States and ordered the petition to cancel dismissed.[7] On appeal from this order, however, the Circuit Court of Appeals for the Seventh Circuit, by a divided court, held the naturalization certificate to have been illegally procured and directed the District Court to vacate its decree of dismissal of the government's petition, and to make an order of cancellation.[8] The applicant then brought the matter to the Supreme Court on *certiorari*.

Three questions were presented to the Supreme Court: 1. Whether the requirement in the Naturalization Act that the applicant's certificate of arrival shall be filed with the petition and remain on file until the hearing is one with

[4] Secs. 5 and 6, Act of 1906, *supra* (U. S. C. Title 8, Secs. 397 and 396).

[5] Sec. 6, Act of March 3, 1891; 26 Stat. 826, 828 (U. S. C. Title 28, Secs. 225, 346, 347 and 350); Sec. 128, Act of March 3, 1911; 36 Stat. 1087, 1133 (U. S. C. Title 28, Sec. 225); Sec. 128 (a), Act of February 13, 1925; 43 Stat. 936 (U. S. C. Title 28, Sec. 225).

[6] 34 Stat. 601 (U. S. C. Title 8, Sec. 405). The pertinent portion of this section provides: "That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought." This duty may also be performed by the Commissioner or Deputy Commissioner of Naturalization. Subdiv. 7, Sec. 4, Act of 1906, *supra*, as amended by Sec. 1, Act of May 9, 1918; 40 Stat. 542, 544 (U. S. C. Title 8, Sec. 405).

[7] United States *v.* Maney (D. C., E. D. Wis., 1926), 13 F. (2d) 662.

[8] United States *v.* Maney (1927), 21 F. (2d) 28.

which the naturalization court may dispense at its discretion. 2. Whether the failure to file the certificate of arrival with the petition, and the action of the naturalization court in granting naturalization without compliance with that requirement make the naturalization "illegally procured" within the meaning of Section 15 of the Naturalization Act so as to support a suit for cancellation. 3. Whether, if a cancellation proceeding is within the scope of Section 15 and authorized by it, the fact that the United States, through the Naturalization Examiner, appeared in the naturalization proceeding and objected to the granting of naturalization on the same ground asserted in the cancellation suit renders the matter *res judicata* so as to defeat the cancellation proceedings.[9]

The case turned upon the nature and value of the certificate of the alien's arrival. The Circuit Court of Appeals had referred in its opinion to the importance attached to it by the Supreme Court.[10] This certificate is the natural starting point for the investigation by the examiners of the Bureau of Naturalization to determine the merits of the application. It aids in ascertaining whether the petitioner was within any of the classes of aliens excludable from admission to the United States under the immigration laws or is among those excluded from naturalization for political beliefs or practices, and whether he has had the minimum period of residence in the United States required by the statute. In its decision in the Maney case, *supra*, the Supreme Court sustains the majority opinion of the Circuit Court of Appeals in holding that the filing of the certificate of arrival with the petition for naturalization *at the same time the petition is filed* is jurisdictional, a condition precedent attached to the authority of the lower court to grant naturalization. The trial court cannot cure the applicant's failure in that respect and enlarge its own powers by embodying in a *nunc pro tunc* order a fiction that the certificate was filed in time. The requirement is therefore mandatory and not discretionary.

As the naturalization record showed on its face that the certificate of arrival had not been filed as required by the statute, the Supreme Court says that the decree admitting to citizenship is bad, and "illegal" in the sense that it is "unauthorized by and contrary to law." This is quite opposed to one view which had been held, that the words "illegally procured" are limited to "a positive, affirmative act on the part of the procurer, and one of a sinister character," and are intended to cover a case "not an error of law, but subornation, or some other illegal means, to impose on the court." [11]

Finally, the Supreme Court announces that the judgment attacked did no make the matter *res judicata*, as against the express statutory provision in

[9] Brief for the United States, p. 2, in Maney *v.* United States, No. 27, October Term, 1928; 49 S. Ct. 15.

[10] See United States *v.* Ness (1917), 245 U. S. 319, 323.

[11] United States *v.* Richmond (C. C. A., 3rd Cir., 1927), 17 F. (2d) 28, 30; United States *v.* Srednik (C. C. A., 3rd Cir., 1927), 19 F. (2d) 71.

Section 15 to review the order by cancellation proceedings. The difference between this and ordinary cases is sufficient, says the court, to warrant "a special treatment." While the court had stated in Tutun *v.* United States that proceedings by an alien for admission to citizenship are judicial,[12] "they are not for the usual purpose of vindicating an existing right but for the purpose of getting granted to an alien rights that do not yet exist." [13] Hence, not only the conditions attached to the grant, but those attached to the power of the instrument—the courts—used by the United States to make the grant, must be complied with strictly, as in other instances of government gifts.[14] Therefore, not only the alien but the naturalization court as well must observe closely the requirements of the naturalization statutes. The Circuit Court of Appeals in the instant case had previously insisted that "the form and contents of the alien's sworn petition to the court, and the manner of its preparation, filing, and presentation, shall be in exact accordance with the provisions of the act, and not otherwise, before there is any power in the court to act upon it." [15]

The decisions in the Maney and Ness cases, the former of which originated in a Federal and the latter in a State court, effectually negative the view that the doctrine of *res judicata* may be validly urged against the government as a defense in a suit by the latter to cancel a naturalization for illegal or fraudulent procurement, even though the government has appeared in the naturalization court and litigated the particular point. This is subject to the limitation that it is not a minor question such as the competency or weight of evidence, or the credibility of witnesses, or mere irregularities in procedure.[16]

[12] (1926), 270 U. S. 568, 577. See article, "The Right of Appeal in Naturalization Cases in the Federal Courts," by the writer, in this JOURNAL, Vol. 21, No. 1, pp. 40–52 (January, 1927).

[13] Maney *v.* United States, *supra*, 49 S. Ct. 15.

[14] "This [Act of 1906, *supra*] specifies with circumstantiality the manner ('and not otherwise') in which an alien may be admitted to become a citizen of the United States; . . ." United States *v.* Ginsberg (1917), 243 U. S. 472, 473. "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant." United States *v.* Manzi (April 9, 1928), 276 U. S. 463, 467.

[15] United States *v.* Maney (C. C. A., 7th Cir., 1927), 21 F. (2d) 28, 29.

[16] United States *v.* Ness, *supra*. See also: United States *v.* Ovens (C. C. A., 4th Cir., 1926), 13 F. (2d) 376; United States *v.* Milder (C. C. A., 8th Cir., 1922), 284 Fed. 571; United States *v.* Mulvey (C. C. A., 2nd Cir., 1916), 232 Fed. 513; United States *v.* Ali (D. C., E. D. Mich., S. D., 1927), 20 F. (2d) 998; United States *v.* Leles (D. C., N. D. Calif., 2nd Div., 1916), 236 Fed. 784. United States *v.* Gokhale (C. C. A., 2nd Cir., 1928), 26 F. (2d) 360, was a case in which the applicant, a high-caste Hindu, had been naturalized in a State court prior to the rendition of United States *v.* Thind (1923), 261 U. S. 204, wherein the Supreme Court held Hindus to be ineligible to naturalization. After the latter decision, Gokhale's naturalization was canceled by a United States District Court in 1926, a few months prior to the decision in United States *v.* Sakharam Ganesh Pandit (C. C. A., 9th Cir., 1926), 15 F. (2d) 285, *infra*. The Circuit Court of Appeals in the Gokhale case upheld the District Court, on a plea of *res judicata*. His prayer to the Supreme Court for writ of

The dissenting member of the Circuit Court of Appeals in the Maney case had quoted with approval the opinion to the opposite effect in United States *v.* Sakharam Ganesh Pandit, a high-caste Hindu, who was naturalized by a State court.[17] But long prior to the latter decision, the Supreme Court seemed to have settled the same point in the Ness case, *supra*, which, however, was not mentioned in the Pandit case. One of the questions raised by the Ness case was whether an order entered in a naturalization proceeding to which the United States became a party under Section 11 of the Naturalization Act,[18] is *res judicata* as to matters actually litigated therein, so that the certificate of naturalization cannot be set aside under Section 15, as having been "illegally procured." The Supreme Court answered that Sections 11 and 15 were designed to afford cumulative and not alternative means of protection against fraudulent or illegal naturalization.

An important point in the Maney decision, applicable generally in principle, is the confirmation by the Supreme Court of the rule already supported in the Ness case—that the regulations of the Secretary of Labor concerning the certificate of arrival have the effect of law. Specific approval is given to the rule [19] prescribing that when a clerk of court executes a petition for naturalization of an alien in whose case a certificate of arrival is necessary and fails to receive and attach the certificate in accordance with the statutory requirement, no valid petition is docketed. The clerk is cautioned not to commence to execute the petition until he has received the certificate of arrival.

The legislative attitude may be gathered from the following:

> Experience and investigation had taught that the wide-spread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the

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certiorari was allowed Oct. 22, 1928 (No. 361, October Term, 1928). On Nov. 19, 1928, the Supreme Court granted stipulation to vacate and set aside the judgments of the lower Federal courts and to remand the cause with directions to dismiss the bill of complaint. The *United States Daily*, Nov. 20, 1928, p. 4 (yearly index 2326).

[17] C. C. A., 9th Cir. (1926), 15 F. (2d), 285. See editorial comment upon this case, "Denationalization of American Citizens" (high-caste Hindus), by J. W. Garner, in this JOURNAL, Vol. 21, No. 1, pp. 106–107 (January, 1927). The Supreme Court in this case had denied the government's petition for *certiorari*. United States *v.* Sakharam Ganesh Pandit, No. 870 (March 14, 1927), 273 U. S. 759.

[18] Sec. 11, Act of 1906, *supra* (U. S. C. Title 8, Sec. 399), which provides: "That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

[19] Rule 5, Naturalization Regulations, editions of Feb. 15, 1917, and Sept. 24, 1920, Washington, Government Printing Office.

> prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization" embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which naturalization of aliens was entrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization. [20]

And the position of the courts is thus set forth:

> An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. . . . No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it as provided in §15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential. [21]

Citizenship has never been so important as now. In view of the consistency with which the Supreme Court has stressed high standards in construing the naturalization statutes, every one concerned is upon notice that the specified requirements must be scrupulously met if a naturalization judgment is to be unassailable.

[20] United States *v.* Ness, *supra*, p. 324.

[21] United States *v.* Ginsberg, *supra*, pp 474, 475.

THE ORIGIN OF THE LAW OF UNNEUTRAL SERVICE

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The law of unneutral service deals with those acts of neutral vessels which constitute assistance to a belligerent, significant enough in consequences to give the offender a hostile character. It must be emphasized that, contrary to the inferences of some writers, unneutral service has nothing to do with acts committed by a hostile state. There are rules dealing with such acts, but they are not comprehended within the meaning of the term which is the subject of this discussion.

The concept of unneutral service is an old one, though its modern application did not appear until the early years of the nineteenth century. The theory was originally applied to the carriage of contraband. More recent practice has recognized the extravagance of this early application and has restricted the theory to more serious offenses. The transportation of enemy troops and dispatches were the first activities to be brought within the scope of the modern law of unneutral service. It will be necessary, therefore, in tracing the origins of the modern law of unneutral service, to discuss the early treatment accorded to such activities.

The original rules dealing with the transportation of enemy troops classified them as contraband of war. The treaty of 1604 between England, Spain and Burgundy was the first one to treat contraband in a thoroughgoing fashion, and in it troops were listed under the heading of contraband of war.[1] Ten years later Sweden and Holland in a treaty of alliance referred to the transportation of enemy troops by a neutral vessel in a similar way.[2] The practice persisted, and was adopted at large by the leading nations of Europe until troops were almost universally treated as contraband of war in the agreements that were made by various states. During the seventeenth century the following states of Europe made treaties in which soldiers were listed as contraband: England,[3] Sweden,[4] Spain,[5] Denmark,[6] Netherlands,[7] France,[8] Burgundy.[9] The Hanseatic League and Portugal made many

[1] Atherley-Jones, Commerce in War (London, 1907), p. 54. [2] *Ibid.*, p. 54.

[3] Treaty July 17, 1656, Great Britain and Sweden, British and Foreign State Papers, Vol. I, p. 696.

[4] Treaty, Oct. 21, 1661, Great Britain and Sweden, Dumont, *Corps Diplomatique*, Vol. VI, Pt. II, p. 384.

[5] Treaty, May 23, 1667, England and Spain, Dumont, Vol. VII, p. 27.

[6] Treaty, July 11, 1670, England and Denmark, Dumont, Vol. VII, Pt. 1, p. 133.

[7] Treaty, 1674, England and Netherlands; Pratt, F., Law of Contraband of War, p. 226.

[8] Treaty, Feb. 1677, France and England; Pratt, *op. cit.*, p. 230.

[9] Treaty, 1604, France, Spain, Burgundy; Atherly-Jones, *op. cit.*, p. 54.

treaties of commerce with other Powers, but they were inclined either to leave contraband undefined or to mention only a very short list which might be expanded by proclamations in time of war. In fact, where a European treaty of the period did not list soldiers as contraband, the treaty in question invariably made no attempt whatever at an inclusive definition. In many such cases proclamations were made at the outbreak of a war enumerating the items which would be treated as contraband, and including troops among them. The French ordinance of 1681 is an example of this sort of action.[10]

The treaties of the seventeenth century made no mention of the carriage of enemy dispatches. Robinson makes it clear, however, that as early as 1636 "the right of the French to visit English ships in order to prevent the transportation of their enemies' advices and directions was admitted." [11] Naturally the carrying of dispatches would assume a greater importance later when wars were carried on over wider areas, as will duly appear.

It is pertinent to ask at this point whether there was any justification for the early practice of classifying and treating the transportation of soldiers as contraband. The explanation of the practice from a practical point of view was the desire of belligerents to carry on a vigorous warfare and prevent aid to the enemy. But there must have been reasons other than the practical one of military expediency, for writers of the period made no effort to protest against the idea as unreasonable or illogical. For instance, both Zouche and Molloy discussed the subject with some thoroughness, yet neither offered any criticism of contraband lists on the ground that soldiers were included therein.[12] Fifty years later Bynkershoek classified soldiers as contraband.[13] It is possible that the cause for the unsatisfactory practice of the times was the undeveloped condition of the current theory of neutrality. In the absence of correct principles which might be applied, it was too readily assumed that the carriage of troops was a contraband activity from the simple fact that it was a noxious one.

The nations of Europe continued throughout the eighteenth century to make treaties in which troops were listed as contraband. Such agreements, however, were less common than they had been during the previous century. As late as 1780, in a treaty between Denmark and England, the following provision may be found: "The two Powers reciprocally agree for themselves and their successors not to furnish to the enemies of the one or the other in time of war any help, soldiers, vessels, or any other articles called contraband." [14] The United States indulged in the practice of the times in her commercial arrangement with the Netherlands in 1783. Article 24 of that agreement reads as follows:

[10] Atherley-Jones, *op. cit.*, p. 54.
[11] Robinson, *Collectanea Maritima*, p. 46.
[12] Zouche, *Juris et Judicii Fecialis*, Part II, Sec. 8, par. 6.
[13] Bynkershoek, *Quaestionum Juris Publici*, Book I, Chap. 9, p. 68.
[14] De Martens, *Recueil de Principaux Traités*, Vol. III, p. 177.

> And under this denomination of contraband and merchandises prohibited shall be comprehended only warlike stores and arms, as mortars, artillery, with their artifices and appurtenances, fusils, artillery, bombs, and other sorts of arms, as also soldiers, horses, saddles and furniture for horses.[15]

The same idea was embodied in Article 2 of the English instructions in the war with Spain in 1768.[16]

While this confusion between contraband and the transportation of troops continued, a far-reaching change was taking place in the prevailing theory and practice of contraband. The transportation of contraband ceased to have the character of a hostile activity which it had formerly possessed. The proof of the change is the modification of the penalty, which had formerly involved confiscation of both ship and cargo, but during the latter part of the seventeenth century, came to affect only the hostile cargo.[17] Undoubtedly the main cause for the alteration was the growing regard for neutral rights, particularly neutral rights of commerce.

This change in the penalty for carrying contraband was entirely reasonable. Neutral commerce had been victimized too generally, for the sake of the successful prosecution of warfare. It was felt, however, that the more lenient penalty should not be applied to the transportation of troops and dispatches. The neutral vessel carrying contraband had formerly suffered unjustly, and now that it was relieved, the neutral carrying soldiers was to be treated with an unwarranted leniency.

The error of both the old practice and its successor consisted in placing troops and dispatches in the contraband list. The transportation of such items serves a belligerent to a much greater degree than does the carriage of mere articles of commerce, such as munitions of war and provisions. So long as the two practices were confused or treated as identical, a sound law on the matter was impossible. Either the neutral vessel would suffer too much for the carriage of articles properly deemed contraband, as under the old practice, or, as under the succeeding practice, the neutral vessel would be treated too mildly for activities of a truly hostile and unneutral nature. Obviously there was a need for the development of a new distinction in international law. This was all the more necessary in view of the fact that neutrality had outgrown its elemental character and was now clamoring for readjustments at many other points.

Undoubtedly, the first clear enunciation of the desired distinction was made in the English prize courts during the early part of the nineteenth century. Before discussing those decisions, however, it will be advisable to examine earlier history for the purpose of finding any practices or opinions that may have influenced the courts. Their great contribution to the law

[15] Malloy, Treaties, Vol. II, p. 1240.

[16] 6 Robinson, 520, notes to *Friendship* case.

[17] For an example of the change in the penalty, see the treaty between France and Holland of 1662, Dumont, VI, Pt. II, p. 415.

was their distinction between unneutral service as such and the mere carriage of contraband. It is quite improbable that their reasoning was entirely *a priori*. Certain practices undoubtedly had existed in the past or were existing at the time which might furnish a starting point for the formulation of such a concept of unneutral service as would enable them to make the distinction which was needed.

The idea of a neutral ship assuming a hostile character on account of the commission of certain defined acts was an old one. It has been made clear that vessels carrying contraband were once regarded as guilty of a hostile act. Furthermore, the theory of unneutral service had previously found expression in the so-called "Rule of 1756." The meaning or content of this rule is well stated by Chitty as follows: "He who is permitted by the enemy to deal, and does deal, accordingly, in branches of commerce, usually confined to the subjects of the enemy must be deemed an enemy himself." [18] The principle had been applied by the Dutch as early as 1604 in their war with Spain, at which time they captured a Venetian ship carrying a Spanish license to trade with the Spanish colonies south of the equator.[19] It was England's vigorous application of the rule against France in 1756 which produced the term "Rule of 1756." [20] The practice embodied a clear conception of unneutral conduct on the part of neutral subjects, and provide additional background for the evolution of the modern law of unneutral service.

There was also a partial basis for the modern law in certain early cases involving neutral ships which had been confiscated on the ground that they had rendered services to the enemy. In 1747, the *Elizabeth-Catherina*, a Swedish vessel (neutral), had been taken into an English port and condemned on the ground that it was carrying contraband goods between enemy ports and that its papers were fraudulent.[21] The court considered that the ship had been "lent" to the enemy, and that "where ships have been carrying goods from one enemy port to another they are always condemned." The case is further evidence of an increasing acceptance of the theory of unneutral services before the early nineteenth century, when the English prize courts made their important decisions.

Finally, it is to be noted that the beginning of a distinction between the carriage of contraband goods and the carriage of troops had been made before the nineteenth century. The first indication of such a distinction occurred in certain treaties between European Powers.[22] The treaty of 1675 between Netherlands and Sweden provided that the liberty granted to goods on a neutral vessel "shall be extended to persons sailing on the same

[18] Chitty, Admiralty Law, p. 56.

[19] Maraden, Law and Custom of the Sea, I, p. 345; Evans, International Law Cases, p. 635, footnotes.

[20] Wheaton, International Law, p. 765.

[21] Pratt, *op. cit.*, p. 115.

[22] Wheaton, Dana ed. (1866), p. 656, footnote.

in such wise that though they be enemies of one or both the parties, they shall not be taken from the ship unless they be military persons in the service of the enemy." [23] The treaty also contained a list of contraband articles in which troops are not found. As Kleen pointed out, treaties with this sort of a provision became very common.[24] In fact, a large number of treaties contained provisions formulated in exactly those words. The treaty of 1778 between the United States and France contained the same rule in almost identical terms.[25] Our treaty with Sweden in 1783 and a later agreement with France in 1800 were similar in their provisions.[26]

These treaties existed contemporaneously with a large number of others, already referred to, in which troops were listed as contraband. It is obvious, therefore, that they did not have a general application nor cover the whole ground.

It is also clear that the distinction found in such treaties was not complete. In fact, it went no further than to give troops a separate classification instead of grouping them as items of contraband. Yet there is some importance to be attached to the fact that these treaties even went so far as to remove soldiers from the contraband list, in spite of the fact that they were to be treated in practically the same manner as contraband was treated. It is not unfair to assume that there was involved some vague notion of the essential difference between soldiers and contraband, as found on neutral vessels, even though there was no clear recognition of the unneutral character of the transportation of the former.

A further query is pertinent as to whether the prize courts had ever, before the nineteenth century, made any decisions in which an attempt was made to apply the doctrine of unneutral service to the transportation of troops or dispatches, as distinct from contraband. During the American Revolution only one case came up in which transportation of soldiers by a neutral vessel was involved. That was the case of the *Hendric and Alida*, involving a Dutch ship captured by the English and found carrying a cargo of powder, guns, and military officers.[27] The court ordered the restoration of the ship and cargo on the ground that there was no clear proof that the cargo was destined to the colonies. Therefore, in this one case where the transportation of soldiers might have been involved, the point was not definitely passed upon.

Another case bearing on the subject came before the courts in 1795. This was the case of the *Sally*, an American vessel carrying corn from Philadelphia to Havre and having on board a dispatch from the French Minister in the United States to the Minister of Foreign Affairs in Paris.[28] The court did not go into the legality of the carriage of dispatches, as it might have

[23] Dumont, Vol. VII, p. 316.
[24] Kleen, *Lois et Usages de la Neutralité*, Paris (1898), Vol. I, p. 464.
[25] Malloy, Treaties, Vol. I, p. 477.
[26] Malloy, *ibid.*, Vol. II, p. 1724, U. S. and Sweden, p. 1783.
[27] 1 Marriott, 96.
[28] Roscoe, Reports of Prize Cases, Vol. I, p. 29.

done, but was satisfied with condemnation of the cargo as contraband. Perhaps the reason why the court ignored the presence of dispatches was the fact that they were of a purely commercial character. At any rate, there was established no precedent regarding the unneutral character of the carriage of dispatches which might have afforded guidance to the courts in their later decisions.

There is ample support for the conclusion that the English courts of the early nineteenth century were the first to enunciate clearly such a distinction between the carriage of contraband and the transportation of troops or dispatches as would characterize the latter as unneutral service. Creasy wrote in 1876, "A ship may become liable to be seized and confiscated for carrying contraband dispatches . . . this part of the law is no older than the present century, but was fully established by authority as well as based on sound reasoning."[29] The same conclusion was earlier reached by Upton.[30] Those jurists who have given the matter their attention are thus convinced that the application of the theory of unneutral service to the carriage of troops and dispatches was not made before the nineteenth century.

The decisions of the English prize courts during the first decade of the last century, therefore, take on an aspect of importance. It is generally conceded that the period was a vital one in many respects for the history of international law. In the first place, the Napoleonic wars were in progress, and the courts were obliged to adjudicate a large number of prize cases. Furthermore, it was a period when the laws dealing with the rights and duties of neutrals were experiencing a rapid development. That the prize courts were quite able to meet the heavy demands of the period may be seen from the long list of important decisions for which they were responsible. Preëminent among the judges who participated in those decisions was Sir William Scott of the English High Court of Admiralty.

During the first decade of the nineteenth century the British courts produced at least eight decisions, which taken together constitute the foundation of the modern law of unneutral service.[31] In addition there were a few cases of slighter consequence. In some instances the transportation of troops was involved, while in others the transportation of dispatches constituted the issue. The cases involving dispatches will be discussed first.

The case of the *Constitution* came before the Lords in 1802.[32] Its impor-

[29] Creasy, First Platform of International Law, London (1876), p. 627.

[30] Upton, The Law of Nations Affecting Commerce during War, N. Y. (1863), p. 332.

[31] A list of the decisions of the decade is as follows: *Orozembo*, 6 Robinson, 430, 1807 (High Court of Admiralty); *Atalanta*, 6 Rob. 440, March, 1808 (High Court of Admiralty); *The Constitution* (Lords), July 14, 1802; *Hope* (Lords), April 23, 1802; *Trende Söstre* (Lords), Aug. 5, 1807; *Susan* (Lords), Apr. 1, 1808; *Constantia* (Lords), Mar. 15, 1808; *Caroline*, 6 Robinson, 464, April 1, 1808 (High Court of Admiralty); *Madison*, Edwards, 234, 1810 (High Court of Admiralty); *Rapid*, Edwards, 228, 1810 (High Court of Admiralty); *Carolina*, 4 Robinson, 256, Apr. 30, 1802; *Friendship*, 6 Robinson, 429, 1807.

[32] 6 C. Rob. 455.

tance was derived from the fact that it established a precedent for other decisions which soon followed. It was on this occasion that a court first applied the idea of unneutral service to the carriage of dispatches. The case involved a neutral vessel which was engaged in trade between France and her West Indian possessions and was carrying on board a French dispatch. The court ordered the condemnation of the ship. The importance of the decision as a precedent can readily be seen from a statement by Sir William Scott in the case of the *Atalanta*, six years later.[33] He asserted:

> It has already been laid down by the Superior Court in the *Constitution* that the fraudulent carrying of dispatches is a criminal act which will lead to condemnation. . . . Under the authority of that decision, then, I am warranted to hold that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is strangely cast upon this court, that it is guilty of interpolations in the law of nations.

The statement makes it clear that, in the mind of Sir William Scott, the case of the *Constitution* was the first one differentiating dispatches from contraband, and applying the penalty of confiscation to a neutral vessel which is guilty of transporting the former. Soon after this first application of the idea of unneutral service to the transportation of dispatches, the courts were obliged to decide several other cases in which the same issue was present.

In 1803 the case of the *Hope* appeared before the Lords.[34] Here there was merely a suspicion that dispatches were present on board the vessel, but the court finally decided that there was "no such paper on board," and the vessel was restored.

Four years later a third case came before the House of Lords. This was the case of the *Trende Söstre* (1807), a vessel which had been carrying among other things dispatches addressed to the government at the Cape of Good Hope.[35] The Lords were relieved of the necessity of stating the law dealing with neutral vessels carrying enemy dispatches by reason of the fact that the Cape of Good Hope had ceased to be a colony of the enemy and had become an English colony just before the capture of the vessel was made.

During the same year the case of the *Lisette* came before the House of Lords.[36] It had to do with a neutral vessel carrying hostile dispatches which were concealed by a woman on board. The master had been ignorant of the presence of dispatches. The opinion set forth two *dicta*. In the first place, it stated for the first time the rule that a ship carrying hostile dispatches ignorantly should be restored, unless the ignorance was due to lack of diligence on the part of the master. That rule was reaffirmed in later cases. In the second place, it is apparent from the nature of the exception made that, had the master acted knowingly, his vessel would have been liable to confiscation on the basis of the rule established in the case of the *Constitution*.

The case of the *Atalanta* was decided in 1808 by the High Court of Ad-

[33] 6 C. Rob. 440.
[34] *Ibid.*, 456.
[35] *Ibid.*, 457.
[36] *Ibid.*, 456.

miralty. It involved a Bremen (neutral) ship on a voyage from Batavia to Bremen, which had taken on board at the Isle of France a packet containing a dispatch to the Minister of Marine in Paris. The opinion in the case derives its significance, in part, from the ruling that the fraudulent carrying of dispatches was sufficient ground for confiscation of the ship and its cargo. This part of the decision was based upon the action of the House of Lords in the case of the *Constitution* to which reference has already been made.

In the second place, the opinion of the case gave a ruling in regard to the legality of the carriage of dispatches knowingly, but free from any element of fraud. The position stated was as follows:

> In the present state of the world it is an object of great importance to preserve the connection between the mother country and her colonies. . . . If a war intervenes and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to affect the same purpose under the privilege of an ostensibly neutral character, does, in fact, place himself in the service of the enemy state, and is justly to be considered in that character.[37]

Finally, the court ruled in the case of the *Atalanta* that a neutral ship carrying dispatches for the enemy must be taken *in delicto*. As will appear later, the ruling of Sir William Scott in the case of a neutral vessel which had not come under enemy control has not been applied to vessels which are under contract to the enemy.

In 1808 another case involving dispatches was heard by Sir William Scott. This was the case of the *Caroline*, an American vessel sailing from New York to Bordeaux and having on board a dispatch from the French Minister in the United States to his own government.[38] This case was based upon an entirely different set of facts, for the dispatch in question was sent by an enemy minister who was located in a neutral state. The act of the *Caroline* was not considered illegal. The attitude of the court was that "the neutral country has a right to preserve its relations with the enemy and you are not at liberty to conclude that any communication between them can partake in any degree of the nature of hostility to you." There were also in the decision two other rulings of the court which carry some weight. In the first place, there was a description of the sort of dispatches which might be regarded as hostile in the statement that, "It is sufficient that it relates to the public business of the enemy be it great or small." In the second place, the court was of the opinion that the carriage of ordinary private letters between persons was not an illegal enterprise.

In the case of the *Susan* (American vessel) a message from France to the Prefect of the Isle of France dealing with the payment of that officer's salary was involved.[39] The court applied the rule of the cases of the *Constitution* and the *Atalanta* and confiscated the vessel. There is some significance in the fact that the unimportant nature of the dispatch was no

[37] 6 C. Rob. 461. [38] *Ibid.*, 461. [39] *Ibid.*, 461, notes.

ground for refusing to apply the ordinary penalty. In fact the attitude of the court at this point seems to be a reaffirmation of the ruling in the case of the *Caroline* regarding the nature of prohibited dispatches. In the case of the *Constantia* (1808) the Lords applied the rule of condemnation to a Danish vessel carrying a dispatch which was ultimately bound for France.[40]

In 1810 two other cases in which dispatches were concerned came up, and both of them were adjudicated in the High Court of Admiralty. One of them was the case of the *Madison*, in which the court applied the same rule that had been laid down in the case of the *Caroline*, exempting the vessel from condemnation on the ground that the dispatch, being sent by the Danish Government to its Consul-General in the United States, was entirely legal.[41] The case of the *Rapid* reaffirmed the holding of the court in the case of the *Lisette* that the master of a neutral vessel is bound to use a reasonable amount of precaution in order to avoid transporting hostile messages.[42] It was further stated that "the caution of the master must be proportioned to the circumstances under which the papers were received."

During the same decade in which the above decisions dealing with the carriage of dispatches were made there were also adjudicated three cases which had to do with the carriage of troops by vessels claiming the status of neutrals. The first was the case of the *Carolina* (1802).[43] It involved a Swedish vessel (neutral) which had served in the French expedition to Alexandria, Egypt, as a transport to convey French troops. The court considered that the vessel was an enemy vessel in nature, and treated it as though it were an enemy transport. The fact that duress had been used and that the vessel had been forced into the service of the enemy was not admitted as a mitigating circumstance, for, as Sir William Scott said, otherwise "there would be no end of any prohibition under the law of nations to engage in any hostile act." It was also ruled that a neutral vessel acting as enemy transport need not be taken *in delicto*. This case was, apparently, the leading one in which the law dealing with the transportation of troops was enunciated. It is interesting to notice that the first cases dealing with both troops and dispatches occurred in the same year. The case of the *Carolina*, however, was decided a few months earlier than that of the *Constitution*.[44]

During the year 1807 two other cases of a similar nature appeared in the High Court of Admiralty. One was the case of the *Friendship*, an American ship (neutral) captured on a voyage from Baltimore to Bordeaux and having on board certain cargo and ninety passengers, eighty-five of whom were French marines shipped under the direction of the French Minister in America.[45] The decision was essentially the same as that found in the case

[40] 6 C. Rob, 461 note. [41] Edwards, 224. [42] *Ibid.*, 228.
[43] 4 C. Rob. 256.
[44] The *Carolina* was decided April 30, 1802, and the *Constitution* on July 14, 1802.
[45] 6 C. Rob. 420.

of the *Carolina*. The vessel was condemned because of its hostile character. Sir William Scott said, "Under these circumstances, I am of the opinion that this vessel is to be considered as a French transport." Two other rulings were also set forth. The first was that if the troops "were going merely as ordinary passengers, and as other passengers do, and at their own expense, the question would present itself in a very different form." The second was that "it would be a very different case if the vessel appeared to be carrying only a few individual invalidated soldiers or discharged sailors."

The case of the *Orozembo* was also decided during the year 1807.[46] Here an American vessel had been employed by the enemy for the transportation of military persons first to Macao but ultimately to Batavia. The court's decision followed the rule as set forth in the other two cases. The vessel was considered as a "transport subject to condemnation." The court was of the opinion that the number of persons transported and ignorance of the nature of the service being rendered were irrelevant considerations.

The present conception of unneutral service is undoubtedly founded upon this compact series of cases handled by the English courts during the early part of the nineteenth century. The contributions of the High Court of Admiralty are particularly noteworthy because of the original application of the idea of unneutral service to neutral vessels carrying enemy troops. On the other hand, the contributions of the House of Lords were entirely in regard to that part of the subject of unneutral service which deals with dispatches and their transportation.

As a result of this body of decisions, it became clear that troops and dispatches were not to be treated as contraband. In the words of the court in the case of the *Atalanta*, "The carriage of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign." [47] The decisions made it plain that a neutral vessel thus assisting the enemy in the prosecution of war loses its neutral character and may be treated as an enemy ship. Thus, in the three cases that have been surveyed dealing with the transportation of troops, the vessels in question, having come under the control of the enemy, were treated as enemy transports. Likewise, in the other cases an acquired enemy status was either assumed or definitely imputed to the vessel. In the case of the *Atalanta*, for instance, the court said that a vessel carrying enemy dispatches "does in fact place itself in the service of the enemy and is justly to be considered in that character." [48]

The clear emergence of the above distinctions was no guarantee that they would be steadfastly respected by officials. The development of the idea of unneutral service has met with both advances and reverses. The practice of the British prize courts during the first decade of the nineteenth century,

[46] 6 C. Rob. 430. [47] *Ibid.*, 440. [48] *Ibid.*

however, formed a substantial foundation for ultimate progress. The novelty of the decisions of the courts did not lie in the discovery of a new theory of unneutral service, but rather in the application of the old theory to new activities.

The survey which has been made thus far of the origins of the present law of unneutral service has left out of consideration any discussion of the origin of the term itself. It will be advisable, therefore, to explain briefly how the term "unneutral service" came into use, even though the explanation will involve reference to periods of time later than those which have so far been treated.

In the first place, it should be noticed that Sir Christopher Robinson, the early court reporter of the prize cases which were adjudicated by the High Court of Admiralty, commonly used the phrase "unneutral conduct" in the margins. This was as early as 1808, the date when Robinson's cases were first published. Thus in the margin of the case of the *Friendship* the following appears: "Unneutral conduct,—ship engaged as a transport in the military service of the enemy—condemned." The use of such a term by Robinson is all the more noteworthy in view of the fact that it is not to be found in any of the opinions which he reported, although, of course, the idea itself was always present. It is unfortunate that Robinson's terms did not immediately become current. During the nineteenth century all sorts of phrases were used, none of which was as expressive or accurate as that used by the court reporter.

A number of terms have been used which involve the word contraband, indicating an unfortunate confusion of thought in regard to contraband articles and troops and dispatches. Among them are the following: "analogues of contraband," "contrabande par analogie," "quasi-contraband," and "contrebande par accident." They are, of course, entirely inadequate on account of the erroneous conceptions of the subject which they convey. It is possible to find them even yet in modern treaties.

Other terms of a more accurate nature have been used by nineteenth century writers. For instance, Kleen and certain French publicists have used the phrase "Service de Transport."[49] Still other French authors have used the term "Secours Direct".[50] Neither of these two phrases is entirely acceptable for the reason that either may be understood to include a larger number of activities than is actually comprehended. They are less confusing, however, than those terms in which the word contraband is used. Of a similar nature is the formula "die verboten en transporte," used frequently by German writers.[51]

The term "unneutral service" first came into use during the last decade of the nineteenth century. It appeared in editions of textbooks by Law-

[49] Kleen, *Lois et Usages de la Neutralite*, Paris (1898), Vol. I, p. 452.
[50] Bonfils, *Manuel* (1905), p. 756.
[51] Wiegner, *Die Kriegskonterbande*, Berlin (1904), p. 289.

rence and Walker in the year 1895.[52] However, according to the testimony of Professor Freeman Snow, the real originator of the title was Lawrence.[53] Lawrence used the term as a heading for his discussion, while Walker used it in a wholly incidental way in his explanation of the subject. In more recent years it has been adopted widely. It is to be found, for instance, in the Declaration of London.[54] When compared with the other terms that have been mentioned, it is very satisfactory. It completely breaks away from the idea of contraband, and stresses one of the most characteristic traits of the actions involved. It has been suggested by some writers that "hostile aid" would fit the subject even better.[55] This term suggests more directly the belligerent nature of the activities comprehended; it fails, however, to stress the fact that they are of such a nature as to deprive a neutral vessel of its neutral character. Its equivalent, "*l'assistance hostile*," has been used increasingly in France during recent years.

No phrase can express all aspects of the subject. Undoubtedly the term "unneutral service" will serve very adequately. Since its origin a few decades ago, it has been the most widely accepted English term for the activity which it describes, and in all probability will continue to be used.

[52] Lawrence, Principles of International Law, 1895, p. 633; Walker, International Law, 1895, p. 196.

[53] Naval War College, 1898, p. 143.

[54] Declaration of London, Chapter III.

[55] Hershey, Essentials of International Public Law, N. Y. (1915), p. 507, footnotes.

RESERVATION CLAUSES IN AGREEMENTS FOR OBLIGATORY ARBITRATION

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The question of the form to be given to reservation clauses has long perplexed the advocates of arbitration treaties. The making of the new Franco-American treaty, action taken at the Sixth Pan American Conference looking to a conference on an American arbitration convention, and more recent discussion of plans for the prevention of war have re-emphasized the problem which has commanded chief attention during four decades of sporadic effort to establish obligatory arbitration on a treaty basis. Important extensions of the principle of obligatory reference have been effected in certain bipartite arrangements since the conclusion of the World War, largely through revision of old forms by which arbitral jurisdiction was limited. Built upon past experience, these extensions are the result of efforts to shape reservation clauses so as to modify them in the interest of state security, without at the same time nullifying, the arbitral engagements. The theory of reservation clauses has found application in a variety of forms. An examination of these forms in some representative modern agreements reveals the manner in which phrases now used have evolved and especially the development occurring since 1919.

1. THE NATURE OF OBLIGATORY ARBITRATION

Differences over the meanings of commonly used terms have sometimes led to confusion. For the present purpose it seems desirable to employ the technical meaning of "arbitration" (descriptive of a process essentially judicial) in preference to the broader, more general meaning (covering any method of amicable procedure with a view to settlement).[1] Some misconception has resulted from the frequent identification of the terms "obligatory" and "compulsory," as applied to arbitration. The latter suggests the

[1] The distinction between "arbitration" in a strictly technical sense, and "arbitration" in a general sense, embracing "all jurisdiction," was made in the memorandum from the Secretary-General of the League of Nations to the Committee of Jurists on a plan for the World Court (Permanent Court of International Justice, Documents Presented to the Advisory Committee, p. 113).

In the correspondence leading up to the Locarno Conference of 1925 the French Government appeared to subscribe to a very broad meaning of the term "arbitration," the only condition which it believed essential being that the solution obtained should have "un caractère de décision obligatoire" (Parl. Papers, Miscellaneous No. 7, 1925 [Cmd. 2436], p. 14).

idea of physical sanctions to compel performance. In reality, both kinds of arbitration—voluntary and obligatory—proceed upon voluntary assumption of obligations, and compliance with the terms of a resulting award is just as binding upon the parties under voluntary as under obligatory arbitration. The distinction between voluntary and obligatory reference has to do rather with the relation in point of time of the arbitral agreements to the occurrence of disputes. Under obligatory engagements the parties become legally bound in advance of the occurrence of the controversies to arbitrate questions of described kinds, before the parties can have an opportunity to consider the incidents of particular controversies or the manner in which their respective interests may be affected. In contrast, voluntary arbitration agreements provide for reference of existing questions, the nature and bearing of which are known to the parties before their agreement to refer them.[2] The term "obligatory arbitration" is used in the following pages to describe a device for the assurance of peaceful settlement of international disputes; it implies only a legal obligation, dissociated from physical sanctions to compel performance as agreed, where the general agreement is made in advance of the occurrence of disputes ultimately referred to arbitrators.[3] Finally, the term "reservation clause," as it is to be used, refers to any parts of these agreements which have the effect of limiting the jurisdiction, of conditioning or substantially modifying the obligations which the parties accept.

Reservations accompanying promises to arbitrate, and especially the changing forms employed over a period of years, sometimes reflect the result of extended negotiations. Not merely the texts of treaties, a literal interpretation of which alone may sometimes lead to incorrect conclusions, but frequently the accompanying discussions of treaties, and the views elaborated in discussions at international conferences, help to show the direction of development. In any discussion of the question of obligatory arbitration it is to be remembered that technical arbitration, as defined above, presents but one phase of the general question of an international jurisdiction, and that it can never be entirely dissociated from the other methods of amicably adjusting international disputes, particularly mediation and judicial settlement.

[2] *Cf.* Politis, *La Justice Internationale*, p. 193.

It is obvious that an agreement for what appears to be obligatory arbitration may be in reality only an engagement for voluntary arbitration if there is inserted in the treaty a clause specifying that there must be a further agreement (for reference of any dispute after it arises) between the parties before arbitration can actually proceed.

[3] Certain other features, such as (1) provision for unilateral arraignment or *ex parte* reference, (2) provision for the automatic application of agreed sanctions, (3) provision for obligatory *compromis* or for arbitration of the preliminary question of the nature of a particular dispute (where this is disputed between the parties), (4) provision for obligatory appointment of arbitrators, if the arbitral bodies to be employed are not in existence at the time the dispute arises, (5) requirement of obligatory coöperation with tribunals during periods of litigation, and (6) designation of other forms of permitted procedure, and provision for transition from such procedure to technical arbitration, have marked some of the more advanced types of agreements for obligatory arbitration.

2. THEORY OF RESERVATION CLAUSES

The conception of arbitration which gained strength in the nineteenth and early twentieth centuries was built upon a theory of national sovereignty which tended to assert absolute rights of states. This theory of sovereignty was necessary to the development of a system of *voluntary* arbitration, any such system requiring a community of independent and legally equal members. At the same time the theory of national sovereignty was opposed to the idea of a state's being deprived of its ultimate choice of action and means and becoming bound in advance to follow a designated course of action under conditions not known at the time the obligation was assumed.[4] In the effort to reconcile the idea of obligatory arbitration with the possession of inalienable sovereign rights, it was natural that the idea of implied reserves should be urged. According to one view, certain things are always protected, regardless of the terms of a treaty. Should a state agree in a treaty to abdicate any of the supposed fundamental rights, the agreement would remain ineffective and not legally enforceable; if a state negotiating an arbitration convention should fail to include therein the "saving clause" to protect its national honor and vital interests, the clause would still be considered included by implication.[5] This view is opposed by one which insists that a state can bind itself in advance to follow a definite course of action, to which it is thereafter legally obligated to conform, an exception being admitted only in the single case where the actual existence of a state is involved so as to afford a moral justification for declining to proceed as agreed.[6] This latter view holds that arbitration conventions are of no less binding force than other kinds of international treaties; no conditions can be considered as attaching by implication save those which would apply equally for any kind of an interstate agreement.[7]

Whether express or implied, reserves of the nature suggested have not, when actually invoked, been easily reducible to precise definition.[8] It has been

[4] Merignhac, *Traité de l'Arbitrage International*, p. 185, quoting an opinion on this point.

[5] This view was presented at the First Hague Conference by Dr. Zorn, representing Germany on the Third Commission.

[6] Schucking, The International Union of the Peace Conferences, pp. 135–137. This writer defends the idea that in treaties there may be a legal binding of states in the manner suggested, for "in international contracts there is certainly a subordination to a foreign will." In illustration, the case of extradition treaties, where a state "renounces the right to decide . . . on demand for extradition," is suggested; no diminution of sovereignty is thought to result from such an agreement, which has been entered into voluntarily and can be renounced at the will of either party (*op. cit.*, 122, 123).

[7] See statement of implied reserves, attaching to every treaty, in Hall, Treatise on International Law (7th ed.), pp. 361–370.

[8] For attempts to define "national honor" and "vital interests," see discussion before the Institute of International Law in 1904 (*Annuaire*, XX, 181 *ff.*). The equivocation in the use of the word "independence" was there pointed out, also the desirability (suggested by Descamps) of using the words "*droits inalienables*" instead of "national honor" or "vital interests" in reservation clauses.

frequently charged that employment of the broad reservation formulae which were in common use before the World War makes possible any interpretation which interested states wish to adopt, furnishing a convenient way of avoiding all obligation to arbitrate where the interests of either state seem to make such avoidance desirable. So long as each interested state could place whatever interpretation it wished upon the arbitral engagements, progress toward an obligatory system was effectively blocked.

If it be assumed that some reservations are indispensable to any agreement for the arbitration of future disputes, the problem narrows down to the devising of some method for fairly interpreting and applying them. Applied through some impartial agency, these reserve clauses become, instead of obstructions, aids in the maintenance of plans for legally-assured peaceful settlement; for, in fixing the limitations beyond which the party states may not go in *denying* the jurisdiction of arbitral tribunals, they have the salutary effect of preventing the withholding of any question on some vague theory of implied limitations. The history of attempts to secure agreements for obligatory arbitration between great states is largely a record of effort to decide upon some impartial method of applying reservation clauses or some substitute to furnish the protection originally sought through reservation clauses.

These attempts proceed upon the assumption that *some* reserves are always necessary. Support for this assumption is found in, first, the theory of limitations upon the contractual capacity of states. Whether this supposed limitation could be applied so as to prevent the making of treaties which might imperil the actual existence of a state, or extended so as to cover such indefinite things as "national honor" or "interests," remained uncertain so long as interpretation and application by each state for itself was allowed.[9] Strong argument has been offered to the effect that it is better to refrain from unqualified agreements to arbitrate future disputes than to make such agreements which will inevitably be broken after there arises a controversy involving a fundamental right of one of the parties.[10]

In addition to the theory of limitations upon the contractual capacity of states there is, in the second place, the familiar contention that there are inherent limitations upon the subject-matter for which arbitration can be used. Reservation clauses have been employed for the purpose of defining non-justiciable questions, or categories of disputes for which arbitral methods are not suitable. The restriction of arbitral obligations to "legal" questions, and the identification of the terms "legal" and "justiciable" has the effect

[9] The question of how to express necessary reservations occupied the attention of the Committee of Jurists who drew up the draft scheme for the Permanent Court of International Justice. It was at one time proposed to insert in the draft a reservation expressly protecting "inalienable rights"; but this was later abandoned (P. C. I. J., Minutes of the Proceedings of the Advisory Committee of Jurists, p. 259).

[10] *Cf.* Swedish proposals in connection with the plan for the Permanent Court of International Justice (P. C. I. J., Documents Presented to the Committee of Jurists, p. 155).

of excluding all questions of a non-legal character. The idea that questions of any nature which might have some bearing upon the "fundamental rights" of states could never be justiciable, persisted before 1914.[11] And even the view that all questions could be classified according to an objective standard (so as to distinguish legal questions from non-legal or political) was frequently modified by the belief (held, apparently, by many of the representatives at the Second Hague Conference) that a legal question might *become* political at any time by force of circumstances.[12] Thus the second theory of limitations had its most far-reaching effect in the fact that the limitations claimed were neither fixed nor ascertainable, but might vary according to circumstances, changing state interests, the nature of the relationship existing between the particular states, and general state policy changing according to convenience.[13] Negotiators of arbitration conventions have long grappled with the task of describing with more particularity than do the much-used phrases the scope of subject matter for which arbitration may or must be employed.[14] Some advocates of the extension of an arbitral system have rejected this theory, holding that not the intrinsic nature of the questions, but the policy of states with reference to handling determines "arbitrability"; and in support of this view the acceptance by States of the American Union of the obligatory jurisdiction of the United States Supreme Court for interstate suits, without reservation, has sometimes been used by way of analogy.[15] A similar process of "enlarging the

[11] See debate in the United States Senate on the Taft Arbitration Treaties (Congressional Record, XLVIII, 2934 *ff.*). Senator Root was asked whether questions of the kind which up to that time had been commonly reserved from arbitration (*i.e.*, questions affecting national honor, vital interests, independence, or the interests of third states) might ever become "justiciable" under the terms of the proposed treaties. His reply (pp. 2936–2937) was in part as follows:

" . . . I do not see how a question which involves the independence of a nation can be justiciable, because that means a right of capital punishment. Whether 'vital interests' can be justiciable or not depends a good deal upon the scope you give to 'vital interests.' Some people might say that a question was vital and others that it was not. If the vital interest goes to the life of the Nation, I should not say the question involved in it was justiciable. The 'honor of the two contracting States'—there again I well conceive that questions that are supposed to involve honor may be justiciable. I should think most of them would be. The interests of third states cannot be justiciable unless the third parties are also parties to the proceedings. If they are parties to the proceedings, then they would be justiciable."

For further discussions of the meanings of terms generally used in reservation clauses before the World War, *cf.* Morris, International Arbitration and Procedure, 88–100; Erzberger, *Der Völkerbund*, 107; Barclay, New Methods of Adjusting International Disputes . . . , 59 *ff.*

[12] *Cf.* views expressed by the German delegation at The Hague Conference in 1907 (*Deuxième Conférence de la Paix*, 1, 515 *ff.*; II, 49–54).

[13] *Cf.* Nippold, *Die Forthildung des Verfahrens in Völkerrechtlichen Streitigkeiten*, p. 270.

[14] *Cf.* treatment of juridical questions in a *projet* before the Institute of International Law (*Annuaire*, XXV, 411).

[15] *Cf.* opinion of Mr. Justice Baldwin in Rhode Island *v.* Massachusetts, 12 Peters, 597, with definitions and explanations of political and judicial questions.

domain of law at the expense of politics" has been regarded as a reasonable method for states in their international relations. The Permanent Court of Arbitration in at least one instance has suggested the possibility of a "transformation of a moral duty into a juridical obligation." [16] If the realm of non-justiciable (and therefore non-arbitrable) questions is not fixed, but subject to further restriction through conventional agreement, the conclusion of further treaties for obligatory reference appears to mark the path of enlightened progress.[17]

In addition to reserves claimed because of a limited contractual capacity of states and the inherent limitations upon the subject-matter for which arbitration can be used, others have sought a basis in a theory of limitations upon the legal force of arbitral awards. That "manifestly unjust" awards, such as one ordering the subjection of one state to another, would create no legal obligation to carry out the award, is an elementary principle.[18] Acceptance of an award, constituting an obligation growing out of a treaty, is subject to the implied limitations attaching to all treaties.[19] Mr. Secretary Bayard's denial (in 1887) that there was any legal obligation to accept an arbitral award except when such acceptance was definitely specified in a treaty, was not inconsistent with this principle.[20] But two decades later, at the Second Hague Conference, the principle was asserted that acceptance

[16] Award of the tribunal in the matter of interest on indemnities, between Russia and Turkey: Wilson, The Hague Arbitration Cases, 315; this JOURNAL, Vol. 7, p. 178.

[17] If a distinction between questions justiciable and those non-justiciable be accepted, there remains the problem of conferring authority to pass upon the *nature* of controversies, where this is disputed between the parties. To employ reservation clauses with the idea that no "foreigner," even one sitting as a tribunal presumably free from bias or prejudice, can safely be allowed to decide when national honor or vital interests are affected, amounts in practice to establishing the rule that no state *claiming* that its honor or interests are affected need arbitrate. Obligatory arbitration could never then be realized; for the extent of a signatory's obligation would be merely to *consider* in good faith whether its fundamental rights were involved. This point, in connection with the arbitration treaties proposed in 1911, was discussed by President Taft in his The United States and Peace, 101 *ff.*

[18] Vattel, Law of Nations (London ed., 1792), p. 257.

[19] At the Second Hague Conference the view was advanced that arbitral awards should be considered complements of the arbitration conventions, and have the effect of additional protocols (*Deuxième Conférence de la Paix, Actes et Documentes*, II, 897: Note on Obligatory Arbitration and personal opinion of M. Asser).

A Nicaraguan treaty of 1890 set forth that an arbitral award under the treaty should be considered "*como Tratado perpetuo, obligatorio y perpetuo*" (*Colección de Tratados* (Managua, 1909), p. 187).

In the Treaty of Lausanne (1923) it was provided that decisions of mixed arbitral tribunals to be set up should be "final and conclusive" and enforced as to nationals of the respective parties "without it being necessary to have them declared executory" (British Treaty Series No. 16, 1923 [Cmd. 1929], p. 79; Article 94, Section V of the treaty).

[20] *Cf.* the further statement of Mr. Bayard that " . . . it is a settled principle of international law that no sovereignty can in honor press an unjust or mistaken award even though made by a judicial international tribunal invested with the power of swearing witnesses and receiving or rejecting testimony" (United States Foreign Relations, 1887, p. 608).

of an arbitral jurisdiction implies the obligation to submit to it in good faith when awards are rendered. Reservations against acceptance of awards may be upheld if included in the *compromis,* but have been held inadmissible if not consistent with the object of the *compromis.*[21] The legal effect to be given awards is frequently set forth in the *compromis;* subject to reservations therein, the giving of the award creates a new right between the parties, and the state in whose favor an award has been rendered has a right by contract to have the right performed, although it may not be able to invoke any legal processes for enforcement.[22] The Hague principle appears to have become well established. The need for express reservation clauses on this third basic theory disappears if it be the accepted rule, as the record of actual procedure seems to show, that the enforceability of an arbitral award is subject to no limitations greater than those upon any rule of international law or provision of an interstate contract.

3. LEGAL EFFECT OF RESERVATION CLAUSES

When an arbitration agreement with reservation provisions is concluded, there is no implied consent on the part of the signatories to arbitrate a dispute as to the *nature* of any controversy arising between them. A review of practice seems to establish that, if an arbitration convention is ratified in which this point is not covered, but in which there are set forth certain categories of disputes which are *not* to be arbitrated, the presumption is that each state may decide for itself whether a particular dispute falls inside or outside of the reserved classes of questions. If *ex parte* reference is not permitted, and no obligatory *compromis* plan agreed to, each signatory may follow its own volition in interpreting the reservation clause and in accepting or denying the jurisdiction of the tribunal established. The effect of inserting a reservation clause without providing for its application through a decision of some outside agency is therefore to keep arbitration on what is really a voluntary basis. The rule is stated in the report of the sub-committee of the League of Nations Assembly which examined the draft scheme for the Permanent Court of International Justice, as follows:

[21] *Arbitrage au sujet de la détermination des limites entre l'Autriche ou plutôt la Galicie et la Hongrie près du lac dit "L'Oeil de la Mer"* (text of decision in *Revue de Droit International et de Législation Comparée,* 2nd Series, VIII, pp. 196–212). In the course of the opinion the tribunal said:

" . . . *le tribunal ne doit pas admettre la réserve comme faisant tort à son prestige et à l'autorité de la chose jugée par l'arbitrage. D'ailleurs, le dispositif du compromis portait que la détermination de la frontière dans le cadre désigné par les conclusions des deux gouvernements fût définitive et non pas provisoire et temporaire.*

"*Il s'agissait donc de terminer le différend définitivement, sans aucune réserve pour un débat ultérieur. La réserve . . . est donc en contradiction avec le but du compromis et, pour cette raison, inadmissible.*"

[22] Westlake, article, "International Arbitration," International Journal of Ethics, VII, p. 5.

> *. . . Si une convention établit sans aucune réserve la juridiction obligatoire pour certains cas ou pour certaines nations (comme le font certains traités généraux d'arbitrage ainsi que certaines clauses des traités de paix visant les droits des minorités, la travail, etc.) chacune des parties a, en vertu d'un tel traité, le droit sans une convention spéciale (un compromis) de recourir à la juridiction convenue. Par contre, si la convention générale est soumise à certaines réserves ('intérêts vitaux,' 'indépendance,' 'honneur,' etc.) dont l'appréciation appartient aux parties elles-mêmes, les parties ne peuvent pas recourir à la juridiction internationale sans une convention spéciale. . . .*[23]

It is evident that the act of entering into a special agreement (for reference of a dispute) would constitute an application of a reservation article by the two states so as to accept the jurisdiction. An adverse ruling on the part of either state, in the absence of other means provided for interpretation and application, would release both parties from any further legal obligation in connection with the particular controversy.

4. FORMS OF RESERVATION CLAUSES IN AGREEMENTS BEFORE 1900

The evolution of the most familiar phrases used in reservation clauses may be traced from the time of the Jay Treaty, usually cited as marking a revival of the use of arbitration for the settlement of important questions.[24] Since 1794 there have been four important periods: (1) from the signing of the Jay Treaty to the Alabama settlements in 1872; (2) from 1872 through the First Hague Conference in 1899; (3) from 1900 through the World War; (4) since 1919.[25]

The first of these divisions covers the time when arbitration was gaining favor, but when procedural rules (or what was later called the "organization" of arbitration) had not been developed. Certain early treaties made by the United States for the purpose of assuring negotiation and mediation before resort to war cannot properly be classed as arbitration engagements.[26] There was no occasion for inserting reservation clauses in claims conventions, a considerable number of which had been concluded by 1872, since arbitration therein agreed to was of the purely voluntary kind, the nature of claims being known to the parties before the establishment of the jurisdictions.

[23] P. C. I. J., Documents Concerning the Action Taken by the League, 194.

[24] Provisions in the nature of reservation clauses are to be found before the modern period. When the Swiss in 1355 submitted their differences with the Duke of Austria over the town of Zug and the rural community of Glarus to the arbitration of Charles IV, it was with the preliminary condition that the arbitrator in rendering his award should not touch upon the liberties of these countries, nor their alliance with other cantons (Vattel, *op. cit.*, 259n.).

[25] The division is substantially that of Politis, *La Justice Internationale*, p. 34.

[26] This applies to treaties made by the United States with Barbary States and with South American Republics, embodying a plan of obligatory negotiation and delay before resort to force (Art. 22 of the Jay Treaty, 8 U. S. Stats. 127; *ibid.*, 155, 160, 320, 338, 398). The second treaty cited (with Tripoli, 1796) appears to have gone further than others in the list, imposing an obligation for the peaceful *settlement* of any dispute arising out of the "violation" of any articles of the treaty.

While the United States and certain European states were registering confidence in *voluntary* arbitration, Latin-American states went further, concluding a considerable number of really obligatory arbitration agreements. These engagements sometimes took the form of single (*compromisory*) clauses in conventions relating to other subject-matter, sometimes that of treaties having for their main object to provide methods of amicable settlement and prevent war.[27] The practice, begun soon after the winning of independence by the new republics, was especially marked between 1850 and 1870; within these two decades obligatory arbitration agreements were fairly frequent.[28] The failure of occasional efforts looking to the conclusion of a general American agreement[29] did not prevent the conclusion of bipartite arrangements which attempted to place obligatory arbitration upon a treaty basis without limiting it through the insertion of reservation clauses. The idealistic language of these early Latin-American treaties is to be contrasted with their ineffectiveness as means of preventing war. Conditions in the young republics did not make for the successful operation of such agreements. Successive treaties of the kind appear to have been tried, only to be disregarded. Adequate provisions covering procedure and methods of reference were lacking. The agreements seem to stand rather as expressions of hopes and aspirations of statesmen than as working arrangements; nor can they be accepted as proof of any widely held conviction that obligatory arbitration had become practicable.

During the seventh decade of the nineteenth century there were signed two groups of treaties which introduced obligatory arbitration for certain European states. They were between Hawaii and Siam, on the one hand, and some of the secondary Powers of Europe, on the other. A clause in a treaty of commerce, calling for arbitral settlement not only of questions arising under that convention, but of all questions which might arise be-

[27] Examples of treaties of the former type (containing *compromisory* clauses) are the agreement signed by representatives of Chile and Peru, April 26, 1823 (*Recopilación de Tratados y Convenciones Celebrados entre la República de Chile y Las Potencias Extranjeras*, I, 6, Article XII of the Treaty), and a treaty of 1829 between Colombia and Peru, providing that disputes with reference to the meaning of the treaty be submitted to a friendly government, whose decision was to be absolutely obligatory (*perfectamente obligatoria*) upon both parties (*República del Peru: Colección de los Tratados, Convenciones, Capitulaciones, Armisticios* (Aranda), Lima, 1892, III, p. 236).

[28] Classified according to the regional position of signatories, there were nine treaties between Central American States, nine instances in which a South American State entered into an agreement with a Central American country, and five treaties between South American Powers.

Of the first group, five of the nine carried, along with the arbitral clause, an obligation for the parties "never to make war against each other." Texts are to be found in: *Colección de Tratados* (Costa Rica), I, 118, 119; *Derecho Internacional Guatemalteco, Colección de Tratados* (1892), I, 516, 592; *Colección de Tratados* (Nicaragua), pp. 49, 110, 282, 331, 358, 376.

[29] These efforts are traced by Quesada, Arbitration in Latin America, pp. 7 *ff.*, and by Urrutia, *La Evolución del Principio de Arbitrage en América*, pp. 25–110.

tween the signatory parties, was accepted by a European state in 1864.[30] Other similar agreements followed.[31] In each case there was contemplated a "common accord" of the parties before reference of any dispute and before the arbitral agency could begin to function. There were to be no exceptions based upon express reservation clauses. The obligatory reference principle was accepted; but the parties did not set forth in definite terms the manner in which it was to be applied. Before 1872 obligatory arbitration, generally speaking, was merely a principle; acceptance of it as an ideal had brought forth no adequate comprehension of its practical scope nor effective plan for its operation.

The Alabama settlements inaugurated a movement toward more practical conceptions of arbitral processes and for the regularization of these processes through definite formulae and permanent machinery. The period from 1872 to 1899 was marked by little-organized efforts to reconcile the idea of engagements to arbitrate future disputes with that of unlimited state sovereignty, a period of attempts rather than of achievement in making arbitration obligatory.[32] It was during the latter part of this period that reservation clauses, in the form which later became common, began to make their appearance in practically all arbitration conventions. As during the preceding period, certain republics of Central and South America proclaimed their ardent advocacy of arbitration, and became parties to approximately thirty treaties under which resort to arbitral agencies was in some degree obligatory.[33] Of the treaties between Central American States, one (concluded in 1890) contains a broad reservation clause, arbitration not being obligatory in those matters which, in the opinion of either party, would compromise its autonomy and independence.[34] Of six South American treaties made during the period, three (all signed before 1890)

[30] 52 British and Foreign State Papers, 521: Treaty of Amity, Commerce and Navigation, between Hawaii and Belgium; ratifications exchanged at London, March 12, 1864. Article 27 contains the *compromisory* clause.

[31] Treaties and Conventions Concluded Between the Hawaiian Islands and other Powers Since 1825, p. 83 (with Switzerland); p. 89 (with Italy).

Within the same decade, Siam concluded treaties, containing clauses for obligatory arbitration of all disputes arising under these particular treaties, with Belgium, Italy, Norway, Sweden and Austria-Hungary (59 British and Foreign State Papers, 405; 60 *ibid.*,773; 69 *ibid.*, 1135; 61 *ibid.*, 1308).

[32] *Cf.* the endorsement of obligatory arbitration by such bodies as the Ibero-American Juridical Congress, meeting at Madrid in 1892 (document, *Congreso Juridico Ibero-Americano*, Madrid, 1892, especially pp. 61, 101, 152, 153).

[33] The treaties referred to were bipartite arrangements. During the period from 1872 to 1900, four general treaties (signed by more than two states) were drawn up between Central American countries; but of these, two were apparently not ratified, and the two which did come into effect remained in force for only a short time.

[34] In the last case suggested, arbitration was to be optional for the state raising the claim, but still obligatory for the other state (*Derecho Internacional Guatemalteco*, Vol. I (1892), p. 615 (Article 8 of the treaty).

prescribe obligatory arbitration without reservations;[35] the other three, signed in 1892, do contain reservation clauses, two of them excepting questions affecting precepts of the constitution of either country, and one requiring that only those questions must be submitted to arbitrators which could be "judicially formulated."[36] An agreement made by Ecuador with Mexico in 1888 seemed to recognize that not all questions were capable of settlement by arbitration, and left to the parties themselves wide discretion in deciding whether any given question should be referred.[37] Ten years later, in 1898, Colombia and Peru, states which have been consistent advocates of arbitration, accepted an obligation which was to apply "in general" for all cases of future controversy.[38] The conclusion suggested by the dates of the treaties mentioned is that during the last decade of the period, or roughly, after 1890, Latin-American treaties (even those made by states which had previously subscribed to unlimited arbitration) tend to include reservation clauses.

The most far-reaching attempt to establish a general American arbitration convention seems to have influenced this development. At the first conference of the American Republics, held in Washington, 1889–1890, a project for international arbitration submitted, and accepted by representatives of the majority of states in attendance, included the following provisions:

> Article I. The Republics of North, Central and South America hereby adopt arbitration as a principle of American international law for the settlement of all differences, disputes or controversies that may arise between them.
>
> Article II. Arbitration shall be obligatory in all matters concerning diplomatic rights and privileges, boundaries, territories, indemnities, the rights of navigation, and the validity, construction and enforcement of treaties.
>
> Article III. Arbitration shall be equally obligatory in all cases, other than those mentioned in the foregoing article, whatever may be their origin, nature or occasion; with the single exception mentioned in the next following article.
>
> Article IV. Such exception shall be when, in the judgment of any nation involved in the controversy, its independence might be endangered by the result of the arbitration; for such nation, arbitration shall be optional, but it shall be obligatory upon the adversary Power.[39]

[35] *Tratados, Convenciones, etc.* (Argentina), IX, 329; *Recopilación de Tratados* (Chile: Santiago, 1894), II, 123; Argentine collection cited, II, 152.

[36] Treaties signed by Argentina with Paraguay and Uruguay: *Tratados, Protocolos, Actos y Acuerdos* (Argentina: Buenos Aires, 1912), IX, 268, 596; treaty between Brazil and Chile, signed May 18, 1892: *Recopilación de Tratados, Convenciones, Protocolos* (Chile), V, 71.

[37] *Tratados y Convenciones* (Republicana Mexicana, 1896), II, 355.

[38] *República de Colombia, Informe que el Subsecretario de Relaciónes Exteriores . . . Presenta al Congreso*, 1898, 299. The method to be used was set forth in more definite terms in this treaty than in some of the others of the period.

[39] Reports of Committees and Discussions, International American Conference, II, 954. The quoted text follows that reported by a committee; this form was only slightly changed before being approved by the conference (document cited, pp. 1078–1083).

A reasonable interpretation of the treaty terms would seem to have allowed the general obligation to be modified by the reservation in Article IV, in which case even the listed classes of questions (in Article II) would have been subject to exception on the ground of affecting national independence. But a different meaning was given to the reservation article by Mr. Cruz (Guatemala) of the reporting committee. Speaking before the conference, he explained that the list of questions in the second article was not subject to the operation of the reserve in Article IV, and that for the listed questions "no doubt at all in this respect can ever be entertained." [40] Had this project, with the suggested interpretation, been adopted, it would have gone much further than the project urged at the Second Hague Conference. Although receiving the support of fifteen out of the seventeen states represented at the conference (Mexico supporting subject to reservations on certain parts, and Chile abstaining from voting), the convention never went into effect for lack of ratification. The failure of this attempt served to reveal the substantial opposition which had developed to the idea of unlimited arbitration. After 1890 reservation clauses of the general type proposed in discussions at the Washington conference were commonly inserted, both in general arbitration agreements and in *compromisory* clauses in treaties dealing with other subject-matter.[41]

5. FORMS OF RESERVATION CLAUSES, 1900–1919

The period following the First Hague Conference, during which many arbitration conventions were concluded, brought forth some new forms and some modifications of previously used phrases. The most widely copied form of an arbitration convention was that of 1903 between France and Great Britain.[42] Under this form, the state claiming a right to have a grievance referred had to submit in each case to the other disputant's decision on whether the question affected the latter's national honor or vital interests. This plan, proceeding upon a broad reservation clause, unaccompanied by any obligatory *compromis* plan such as was urged at the Second Hague Conference, leaves it difficult to answer Von Bierberstein's criticism—that arbitration was obligatory so long as there was no dispute, but voluntary immediately a dispute arose.[43]

Other forms of reservation clauses sought to delay consideration by arbi-

[40] Minutes, International American Conference, 761.

[41] *Cf.* Resolutions of the Interparliamentary Union of 1889 and 1892 and references therein to the use of reserves in arbitration engagements, *Union Interparliamentaire, Resolutions* (Lange ed., 1911), pp. 33, 39.

[42] Text in 96 British and Foreign State Papers, 35. The agreement covered only questions "of a legal nature or relating to the interpretation of treaties existing between the two contracting parties"; and from these restricted categories could be excluded such questions as either party might regard as affecting its vital interests, independence or honor, or concerning the interests of third parties.

[43] *Deuxième Conférence de la Paix*, I, 382.

trators of any question within the jurisdiction of national courts (according to national law) until there had been an actual decision (*jugement definitif*) by the municipal court,[44] a type of reservation which in more recent years has been taken to mean that there must first be a definitive judgment by *some* municipal court, not necessarily one by the supreme or highest appellate jurisdiction court.[45] From another direction, the use of the Calvo clause had for its purpose to keep certain matters entirely out of the hands of arbitrators.[46] Experience with the Hay treaties, negotiated for the United States with France and Great Britain, directed attention to the possibility of modifying an arbitration engagement through constitutional arrangement. In this instance, the United States Senate asserted the right, which it has consistently maintained since that time, of passing in each instance upon the matter of reference, and allowing arbitrators to receive a case only under the authority of a formal treaty. In a few treaties, to which American Republics or secondary European states were signatory, some plan of *ex parte* reference was provided.[47] But belief in the policy of a special

[44] Even the treaties which went farthest in the direction of unlimited obligatory arbitration usually had clauses intended to protect the ordinary jurisdiction of municipal courts. In early treaties such questions, when referred to, were usually excluded altogether. Later treaties allowed delay in consideration until the municipal courts might have an opportunity to render decisions.

[45] Schindler, *Les Traités de Conciliation et d'Arbitrage conclus par la Suisse de 1921 a 1925*, pp. 33, 34.

[46] The legal effect of the Calvo clause is discussed in Borchard, The Diplomatic Protection of Citizens Abroad (1914), 809, and in the recent American Dredging Company case before the General Claims Commission, United States and Mexico (Opinions and Decisions, Docket No. 1223).

[47] Perhaps the best example during the period of a treaty free from reserve clauses and setting up an obligatory jurisdiction was the five-power agreement of December 20, 1907, establishing the Central American Court of Justice, with jurisdiction over every dispute which might arise between the parties (100 British and Foreign State Papers, 835). Other "unconditional" agreements in bipartite form, made by Central American with South American States (*e.g.*, Colombia's *compromisory* clause for treaty questions in a convention with Brazil, *Tratados Públicos de Colombia* (Bogota, 1913), 11, 18, and her general arbitration engagements with Ecuador (1905) and Bolivia (1912), 99 British and Foreign State Papers, 1013, 106 *ibid.*, 903), may be set over against certain other treaties which made arbitration obligatory only with some reservations based upon the nature of particular controversies (*e.g.*, the treaties which Brazil concluded in 1909 with Salvador and Honduras respectively, 8 *Nouveau Recueil Général* (Martens), 3rd series, 341, and 105 British and Foreign State Papers, 937). Arbitration clauses covered questions of a legal nature relating to existing treaties, with the exception of disputes touching upon the vital interests, independence or honor of the signatories, or the interests of third states. Mexico and Honduras, when concluding a Treaty of Amity, Commerce and Navigation in 1908, made the *compromisory* clause therein inapplicable to any question which might involve "an attack upon or an offense against their national integrity or dignity" (102 British and Foreign State Papers, 655). In only one of five arbitral engagements by which Bolivia became bound between 1901 and 1905 was there an unconditional agreement to refer all controversies which could not be settled by direct negotiation.

The General Arbitration Treaty of May 28, 1902, between Argentina and Chile, while

agreement for reference of each separate controversy was strong enough to practically defeat the obligatory *compromis* plan offered at the Second Hague Conference.

During the period from 1900 to the outbreak of the World War, much fruitless effort was directed toward the modifying of reservation clauses by the "list" method of setting out categories of subjects, disputes in regard to which would always be considered arbitrable. The most conspicuous failure of such effort came at the Second Hague Conference, when the long discussions brought no approach to an agreement.[48] Perhaps the most important agreement in which the "list" method was later employed was the French-Danish treaty of August 19, 1911; the reserve clause for national honor and vital interests could not be invoked for cases falling within four

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permitting reference by simple demand of one party, withheld questions which might affect the constitutional principles of either state, a reservation which was to frequently appear thereafter in arbitration conventions made by Latin-American states.

Spain and Italy each entered into a number of arbitration engagements with Latin-American states during the period. They contributed to the development by attempting to define with greater precision than had previous treaties the scope of arbitrable disputes and providing for arbitration to determine the nature of controversies. Matters which might affect constitutional principles were reserved. In a group of treaties made by Brazil with European states during the period, broader reservation clauses appear, and no method of *ex parte* reference is provided.

Perhaps the most advanced treaties of the period between the two Hague Conferences were those made by Denmark with Italy (1905) and Portugal (1906), respectively. They covered all disputes of whatsoever nature, except disputes between nationals of one state and the other state in matters which according to local law were within the jurisdiction of local courts; and even cases of the latter kind might be referred if there were any application upon the bearing of a convention, or if they were cases of denials of justice (text of the Danish-Portuguese treaty, 101 British and Foreign State Papers, 287). Under the Danish-Italian treaty, *ex parte* reference was permitted.

In the period after 1907, while the general tendency was decidedly opposed to obligatory arbitration without reservations and on any kind of an automatically-operative basis, certain exceptional treaties are to be found. Perhaps the most conspicuous is that of November 20, 1909, between Italy and The Netherlands. All controversies arising between the signatories, even those having their origin in the past, were covered; no questions were reserved. An elaborate plan to assure reference, even against the will of one of the signatories, was set forth (Vol. XVII, *Recueil des Traités et Conventions conclus par le Royaume des Pays-Bas* . . . (Lagemans-Breukelmann), p. 1035). Other treaties made by Italy (in 1910 and 1911, with Belgium, Norway and Sweden respectively) employed a plan for obligatory *compromis*, but contained reservation clauses for questions such as those affecting independence or integrity of the signatories (text of the Italian-Swedish treaty in 5 *N. R. G.* (3rd series), 359).

[48] The conference consumed much time in an effort to define or list questions which, *unless* national honor or vital interests might be considered involved, could be properly included in an obligatory arbitration convention. It was thought by some that there might be some moral value in such lists. But strong objections were encountered, both to the principle of listing, and to the idea of "listing" particular subjects, *e.g.*, railroad conventions and extra-territoriality. See *Deuxième Conférence Internationale de la Paix*, I, 490 *ff.*; also discussion of this part of the work of the conference in Woolf, International Government, 74 *ff.*

designated classes; arbitrators were to decide, in case of doubt or dispute, whether a given question was within one of the four.[49] But other attempts to conclude treaties embodying a similar plan were unsuccessful. The fate of the Taft treaty projects, negotiated for the United States with Great Britain and France, revealed a strong opposition to letting even a joint high commission determine finally the *nature* of any dispute.[50]

Still another method of handling disputes, illustrated in an agreement of 1909 between the United States and Great Britain,[51] as also in the usual form of the Treaties for the Advancement of General Peace, was to substitute something short of arbitration, making *reference* obligatory without any reserve, but allowing only recommendatory effect to the resulting reports.[52]

Notwithstanding broad claims that arbitration could be adapted to the settlement of all kinds of controversies arising between states, substantial reasons for having reservation clauses (at least in treaties between great Powers) had been successfully urged up to 1914. Protection against arbitrary disregard of fundamental rights of states, which it was thought might result from an unbridled authority in the hands of a tribunal, was considered indispensable. Objections to such authority in tribunals (in the absence of any supervising international agency to afford relief in the

[49] Text in 5 *N. R. G.* (3rd series), 682. The obligation was assumed, in general, for legal questions or those relative to the interpretation of existing treaties; *ex parte* reference was permitted.

[50] The function of the joint high commission was to have been to decide whether any given question was "justiciable" within the scope of the treaty, when this was disputed between the parties. The treaty having been so amended by the Senate as to affect its principal object, ratifications were not exchanged. *Cf.* text of the unratified treaty, Senate Document No. 93, 62nd Cong., 1st Sess., 3–8; for the inserted reservation, Cong. Record, XLVIII, 2954; for statements made in the British Parliament in regard to the negotiations, Hansard, Parliamentary Debates, Fifth Series, Vol. 26, p. 126, Vol. 28, pp. 1273, 1805, Vol. 29, p. 939.

As a scheme to be built upon, and to supplement the Convention for the Pacific Settlement of International Disputes, the Institute of International Law, at its sessions in 1911 and 1912, worked out an elaborate plan for procedure by an international commission when a state raised the claim that its national honor was involved in a dispute (*Annuaire*, XXIV, 224–230; XXV, 411).

[51] Treaty of January 11, 1909, relating to Canadian boundary waters (36 U. S. Stats. 2448). For discussion of the work of the International Joint Commission, and especially the obligation accepted by the signatory parties to refer disputes to the commission for investigation, as well as the competence given the commission to function as an arbitral tribunal if the parties agree to this, see an article by R. A. MacKay, this JOURNAL, Vol. XXII, p. 292.

[52] Where, in the Advancement of Peace Treaties, arbitration was provided as a means of amicable settlement after obligatory reference to a commission of inquiry had not led to a friendly arrangement, it was always with the modification of reserves in the traditional form. Article IV of the treaty with Chile is typical; it contains the following:

"Notwithstanding, any question that may affect the independence, the honor or the vital interests of either or both of the countries, or the provisions of their respective constitutions, or the interests of a third nation, will not be submitted to such or any other arbitration" (39 U. S. Stats. 1648).

event of unwarranted rulings) were not reactionary merely, but went to the basis of the existence of a society of sovereign political bodies. On the other hand, objections to reservation clauses had been urged, not because of the stated object of such clauses (to safeguard fundamental state rights), but because, under color of protecting such rights, the clauses could be made the means of keeping the political interests and territorial ambitions of states from being called into question before any international jurisdiction. In at least nineteen treaties made before the World War, to a majority of which Italy was a party, parties had accepted the obligation to settle by arbitration disputes as to whether particular controversies were arbitrable. But the great Powers had been unwilling to entrust to arbitrators such preliminary questions, thus declining to make arbitration really obligatory, even within reserves. The few really obligatory arrangements which did become effective before 1914 have sometimes been discounted because of the small contact between the signatories and the small likelihood of dependence upon these treaties for the settlement of serious controversies.[53]

During the World War period a few treaties were concluded which provided for arbitration of future disputes without stated reserves. In a boundary agreement of July 15, 1916, Colombia and Ecuador covenanted to "submit themselves expressly to the principle of compulsory arbitration"; they were to adjust by the agreed means differences arising "without other exceptions than those established by the law and practice of nations." [54] The United States, in what appears to have been the first engagement of its kind without modifying reservations accepted by this nation, became bound to arbitrate questions arising under the treaty by which the Virgin Islands were acquired.[55] Uruguay made treaties with Great Britain, France and Italy, as well as with certain American Republics, which imposed arbitral obligations practically without reserve clauses.[56] The British

[53] Politis, *La Justice Internationale*, 226.

[54] 110 British and Foreign State Papers, 826. The inclusion of the last phrase quoted above, with its rather doubtful effect, is believed to furnish what was at that time a novel feature.

[55] 39 U. S. Stats. 1714; Article XI of the treaty. It seems possible that questions might arise under Article VI (dealing with the extension of American citizenship to inhabitants of the islands) which might reasonably be classed as "domestic" under the current interpretation of that term. Since there is no provision for automatic reference, and in view of the traditional attitude taken by the United States Senate in regard to reference (to be effected only through a *compromis* approved by the Senate), the force of this agreement for obligatory arbitration (of questions in regard to the interpretation or application of this particular convention) remains doubtful.

[56] The engagement in each of these treaties applied to "all disputes, of whatever nature"; but disputes which had already been the subject of final settlements could not be reopened, except as to matters concerning the validity, interpretation or execution of awards. The obligations under the treaties did not apply to cases between citizens, subjects, societies or corporations of one of the parties and the other state (except in the event of a denial of justice) where according to the municipal law of the latter state the matter was within the competence of its municipal courts.

and French treaties with Uruguay assume considerable importance from the fact that they go further in the direction of obligatory arbitration, in eliminating reservation clauses or narrowing their scope, than had any previous treaties which these two great Powers had made.[57] But the changes in the reservation articles are perhaps off-set by the fact that no scheme was embodied in the treaties to make possible automatic reference and the functioning of tribunals without some further (reference) agreement between disputant parties.

6. POST-WAR RESERVATION CLAUSES

The period since 1919 has produced the most far-reaching changes in reservation forms. Aside from the Protocol of Geneva and the Locarno conventions, effort to fashion new types of treaties has usually been devoid of the spectacular. The product is not less important for this reason. The record of ratified agreements makes it possible to mark a few definite tendencies which have appeared, and to venture certain conclusions in regard to the point which had been reached in 1927 in the elimination or remodeling of reservation clauses.

Of the first 1,450 international engagements registered with the Secretariat of the League of Nations, something less than one in every five have provisions relating to, and create obligations in connection with, amicable procedure for the settlement of disputes. For the purpose of noting the extent to which and forms in which reserve clauses have been employed, these undertakings may be grouped roughly into seven classes: (1) agreements containing *compromisory* clauses prescribing obligatory procedure in amicable settlement for disputes arising from the interpretation, execution or application of the terms of these particular treaties; (2) renewals of pre-War arbitration conventions or new treaties made according to these old models; (3) agreements accepting arbitration for the settlement of technical questions; (4) regional agreements for peaceful settlement; (5) agreements for judicial settlement of future disputes; (6) bipartite agreements for arbitration of future disputes; (7) combination conciliation and arbitration agreements.

The willingness of France and Great Britain to sign treaties of "unlimited" arbitration at a time when the two Allies were at war, called forth high praise of the two countries from a representative of Uruguay at the First Assembly of the League of Nations (Records of First Assembly, Plenary Meetings, 448; remarks of Sr. Blanco). Texts of the treaties are in 111 British and Foreign State Papers, 742, and 112, *ibid.*, 779. A treaty in substantially similar terms was made by Uruguay with Brazil about the same time (111 British and Foreign State Papers, 672).

[57] The two great Powers had, in certain other instances during this period, agreed to unlimited arbitration of questions arising under particular treaties. *Cf.* the Anglo-Portuguese commercial treaty of August 12, 1914, with a *compromisory* clause by which arbitration might be had on demand of either party (text in British Treaty Series No. 6 (1916) [Cmd. 8402], pp. 35, 36); also convention of September 30, 1915, between France and The Nether-

In the first class fall nearly half of the agreements mentioned above; they comprise both treaties of commerce and other conventions containing *compromisory* clauses for disputes arising in regard to the interpretation, application or execution of terms of the treaties.[58] In a few instances, the obligation has also been imposed of arbitrating disputes as to whether any controversy relates to terms of these treaties.[59] In at least 35 instances it is made clear that the obligation to refer to arbitration shall apply at the "request" or "demand" of one party. In general, reservation clauses are not found in these treaties, except in so far as they are incorporated by reference to other instruments, such as the Hague Convention for the Pacific Settlement of International Disputes, the Statute of the Permanent Court of International Justice, the Covenant of the League, or some bipartite arbitral arrangement existing between the parties. In some instances it is made clear that treaty terms are not to be construed as affecting in any way rights or duties of contracting states as members of the League of Nations.[60] What might be considered a reservation clause is found in a recent treaty of commerce and navigation between Great Britain and Greece. According to this, the two contracting parties agree "in principle" that any dispute arising between them as to the proper interpretation or application

lands for fixing the boundaries of French Guiana and Surinam (text in 110 British and Foreign State Papers, 872). In the latter case, reference was to be by *compromis*, and *ex parte* submission to a tribunal was apparently excluded.

[58] For the purpose of this classification, agreements which provide for settlement under purely judicial, as well as arbitral, procedure have been included. The number includes a number of multipartite arrangements under which disputes with reference to interpretation are to go to the Permanent Court of International Justice.

The list includes at least two conventions to which the United States was a party, an extradition convention signed with Venezuela in 1922 (U. S. Treaty Series No. 675), and a convention signed with the Dominican Republic, December 27, 1924, to replace the convention of February 8, 1907, providing for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic (U. S. Treaty Series No. 726). In the former it is provided that "all differences between the contracting states relating to the interpretation or execution of this treaty shall be settled by arbitration." No such provision is found in other extradition conventions which the United States concluded about the same time, such as those with Latvia, Siam, Bulgaria or Lithuania (U. S. Treaty Series Nos. 677, 681, 687, 699). The message of the President communicating the Venezuelan treaty to the Senate directed attention to the fact (explained in the accompanying report of the Secretary of State) that "the additional article . . . was signed . . . in order to meet a requirement of the Venezuelan Constitution" (Cong. Record, Jan. 5, 1923, Vol. 64, p. 1301).

In the convention with the Dominican Pepublic, it is made very clear that arbitration may not proceed except under a *compromis* approved by the United States Senate.

[59] League of Nations Treaty Series, Nos. 603, 814, 1124, 1256, 1391. In one of these instances (Series No. 1256), a treaty of commerce and navigation between Germany and Italy, a possible reservation is suggested in the provision that an arbitral tribunal shall decide "the preliminary question whether the dispute is of a nature to be referred to the arbitral tribunal."

[60] *Cf.* L. N. T. S. Nos. 1129, 1379.

of provisions of the treaty shall, at the request of either party, be referred to arbitration.[61] As in arbitration engagements made before 1919, it is provided in practically all of these *compromisory* clauses that only those disputes are to be referred which it has not been possible to settle by means of diplomacy.[62] An authoritative interpretation of such a reserve was supplied by the Permanent Court of International Justice in the Mavrommatis Case when, construing a provision that gave jurisdiction only "if the dispute cannot be settled by negotiation," the court reached the following conclusion:

> Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the parties definitely declares himself unable, or refuses to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation.* This will also be the case, in certain circumstances, if the conversations between the governments are only the continuation of previous negotiations between a private individual and a government. . . in applying this rule, the court cannot disregard, amongst other considerations, the views of the states concerned, who are in the best position to judge as to the political reasons which may prevent the settlement of a given dispute by means of diplomatic negotiation . . . [63]

The second group of engagements entered into since 1919, being renewals of pre-War conventions or new treaties made according to these old models,[64] comprise a comparatively small number, to all but two of which either Great Britain or the United States was a party. The substitution of the Permanent Court of International Justice for the Permanent Court of Arbitration does not change the limiting force of the reserve clauses, which continue in the traditional form.[65]

Agreements grouped in the third category, those making obligatory the use of arbitration for the settlement of a great variety of technical questions, do not require reservation clauses, the nature of the questions to be referred

[61] L. N. T. S. 1425.

[62] In the nature of a safeguard for the respective governments, rather than a reservation clause in the usual sense of the term, is the provision that a court of arbitration "shall only be convened by the respective governments and not by subordinate officials or private persons" (Commercial agreement of May 4, 1921, between Czechoslovakia and Austria, L. N. T. S. 388).

[63] P. C. I. J., Series A, No. 2, pp. 13, 15.

[64] *Cf.* conventions made by the United States with Sweden (U. S. Treaty Series No. 708) and Liberia (U. S. Treaty Series No. 747).

[65] One of these renewals was that accomplished by an exchange of notes between the British and Netherlands Governments (L. N. T. S. 977). According to dispatches to the Department of State from American Minister Toben at The Hague, the Dutch Government delayed the renewal of the convention in the hope that the British Government would adopt a broader attitude on the matter of the type of treaty to be made, but this the British Government did not do (United States Daily, June 30, 1926).

being much more definite than are those under any of the other classifications. In exceptional instances, these treaties may anticipate the use of arbitration for the settlement of "legal" questions involved in the technical matters,[66] or, without binding the parties, provide that the latter "may" refer questions of a technical nature to arbitrators.[67]

If the Locarno Treaty of Mutual Guaranty be included, there have been four "regional agreements" concluded since 1919 having for their principal object to promote peaceful settlement of disputes between the signatories. In the Convention for the Establishment of an International Central American Tribunal, signed February 7, 1923, and coming into effect in 1925, the Central American Republics provided a jurisdiction for the settlement of "all controversies or questions which now exist between (the Central American Republics) . . . or which may hereafter arise, whatever their nature or origin," but included also the provision that "questions or controversies which affect the sovereign and independent existence of any one of the signatory Republics cannot be made the object of arbitration or complaint." [68] The Convention for the Pacific Settlement of Disputes between the American States (Gondra Convention), a product of the Fifth Pan American Conference, was in no sense an obligatory arbitration arrangement.[69] It did provide for the obligatory reference of all disputes to *investigation*, but even under this obligation exceptions were allowed to states not parties to general arbitration conventions.[70] Much wider is the scope of disputes

[66] L. N. T. S. 267.

[67] L. N. T. S. 1170.

[68] Text, Conference on Central American Affairs, 1922–1923, pp. 296–313. The convention is to be in effect until January 1, 1934, and thereafter until one year after denunciation by a signatory.

The language of the convention quoted, taken in connection with the rule that "the tribunal shall not admit any complaint which may contravene the provisions of Article I of this convention," and with the carefully prescribed method of reference, which may be *ex parte* if necessary, the reservation would seem to give no right to a single signatory to pass finally on whether a given controversy affected its sovereign and independent existence, this question being left to the tribunal.

[69] Text, L. N. T. S. 831. The treaty, according to its terms, entered into force for the ratifying states in the order of their ratifications. Its duration is indefinite, subject to the right of any signatory to denounce with notification, such denunciation taking effect one year after being made.

Cf. remarks on the terms, Verbatim Records of the Plenary Sessions of the Conference, I, 648 *ff.* The absence of an obligatory arbitration clause (to cover cases in which conciliation might have been tried and failed) was explained as the result of lack of unanimity.

[70] The text of the last paragraph of Article I is as follows:

"It is understood that in disputes arising between nations which have no general treaties of arbitration, investigation shall not take place in questions affecting constitutional provisions, nor in questions already settled by other treaties." Even where questions are submitted to investigation, the parties at the expiration (in ordinary cases) of eighteen months recover entire liberty of action to act as their interests may dictate.

Even this modified form was not ratified by all the republics. See the reported statement of Mr. Hughes at the Sixth Pan American Conference that the Gondra Convention had been ratified by only eight states (N. Y. Times, Jan. 28, 1928).

covered by the convention of January 17, 1925, between Estonia, Latvia, Finland and Poland. This calls for the submission to arbitrators or conciliators of all differences arising between these Baltic states and which they have not been able to settle by diplomatic means, except "questions the legal nature of which make them subject solely to the domestic legislation of the party concerned, or . . . any disputes regarding the territorial status of the high contracting parties."[71] The manner in which states might take advantage of the exceptions provision is not entirely clear from the text. It would seem to be within the authority of the President of the Permanent Conciliation Commission to make up the commission according to the convention and start the conciliation procedure in spite of the protests of one party that the dispute was an "excepted" one. The protesting state in such a case might invoke the jurisdiction of the Permanent Court of International Justice to decide upon the *nature* of the controversy, or might disregard the proceedings entirely. In the latter event, should the commission consider the dispute within its competence and render a report thereon, the dissenting state would become legally bound by the obligatory arbitration clause after six months.[72] The Locarno Treaty of Mutual Guaranty is based upon the separate bipartite arbitration conventions which are to be considered in the last classification below.

The fifth group of post-War agreements comprise those whose principal object is to assure judicial settlement of future controversies (exclusive of the many other conventions with *compromisory* clauses providing for reference to judicial agencies). These include, in addition to acceptances of the optional clause of the Statute of the Permanent Court of International Justice (in which each party state decides upon its own reservations),[73] two treaties made by Switzerland with Brazil and Japan respectively.[74] The former, linking judicial settlement and conciliation as possible methods, does not distinguish between legal and non-legal disputes, but excludes from the operation of the treaty questions which touch upon the constitutional principles of either signatory; the Swiss-Japanese treaty, for judicial settlement only, permits either party to withhold a question on the ground that it touches upon its vital interests, its independence or its honor, or concerns the interests of third states.[75]

[71] L. N. T. S. 991.

[72] The first category of excepted questions under the Baltic States' Agreement is apparently covered by Article 3, which permits the withholding from arbitration or conciliation of questions within the jurisdiction of municipal courts according to municipal law, until a definitive judgment has been rendered by a competent municipal authority.

[73] List of signatories and ratifications, indicating the conditions of acceptance: P. C. I. J., Series E, No. 3, pp. 83–88.

[74] L. N. T. S. Nos. 861, 1072.

[75] For a statement in regard to the reported unwillingness of the Japanese Government to go as far as Switzerland wished to go in extending the scope of this treaty, *cf.* the *Journal de Genève*, April 8, 1925, p. 3.

Another group of treaties includes a number which are general arbitration commitments, either in the form of bipartite conventions for pacific settlement (whose general purpose is to make arbitration obligatory, although they may permit the use of conciliation or judicial settlement as alternative methods), or of "universal" *compromisory* clauses in bipartite engagements. Of the latter, conspicuous in the list are five treaties made by Siam, coming into force in 1926 and 1927 (with France, Italy, Norway, Portugal and Spain, respectively).[76] Only one of these (the treaty with Portugal) contains the old form of reservation clause protecting the independence and honor of the signatories and the interests of third states.[77] There also came into force in 1926 and 1927 six bipartite conventions for the pacific settlement of disputes, to which Norway, Sweden, Denmark and Finland were signatory (each of these states entering into a compact with each other state in the group).[78] The conventions contemplate the reference of all "legal" disputes (within the categories mentioned in Article 36 of the Statute) to the Permanent Court of International Justice; all other disputes must be referred to arbitration. There are no substantial reserves. Delay is permitted in the reference of controversies within municipal courts' jurisdiction according to municipal law, "until a final judgment has been given by the competent court"; and where a state is found to have violated international law and the constitutional arrangements of the state do not afford the means for direct redress, "equitable satisfaction of another kind" is to be ordered by the tribunal. Apparently no disputes arising between the signatories are left without some provision for their settlement. Of the other treaties in this general list (besides the two groups just discussed), some are entirely without reserves, so far as future disputes are concerned.[79] Occasionally are encountered reserves such as those against the arbitration of disputes having their origin in the past,[80] or those already the subject of definitive agreements,[81] or those intended to prevent conflict with rights or

[76] L. N. T. S. Nos. 1055, 1303, 1304, 1404, 1436. A treaty of commerce and navigation which Siam made with Great Britain set forth a somewhat similar obligation, but only for questions of interpretation or application of this treaty (L. N. T. S. No. 1176).

[77] L. N. T. S. No. 1304. The French-Siamese treaty contains a temporary reserve relating to agreements concerning Indo-China (L. N. T. S. No. 1055, Art. 2, paragraph 4).

[78] L. N. T. S. Nos. 1192, 1235, 1242, 1417, 1418, 1420.

[79] See for examples, the treaty of friendship between Afghanistan and Persia, L. N. T. S. 853; the general compulsory arbitration treaty between Uruguay and Venezuela, L. N. T. S. 942, subject only to the reserve mentioned in Note 81 below; agreement concerning arbitration, between Austria and Hungary, L. N. T. S. 457.

A general treaty of arbitration signed between the Argentine Republic and Venezuela in 1911, registered in 1924, reserved questions relating to constitutional provisions of either state and such as, according to the laws of either state, should be settled by the courts of that state (L. N. T. S. 715).

[80] L. N. T. S. Nos. 384 and 1374. But in other agreements such disputes are specifically included under the obligation (L. N. T. S. 457, 888, 1420).

[81] The general compulsory arbitration treaty between Uruguay and Venezuela (L. N. T. S. 942) contains a typical clause of this kind.

obligations under the League of Nations Covenant,[82] and even a provision reserving to the parties "full liberty of action in regard to questions of sovereignty as defined by the rules of international law." [83] Others except controversies between one state and a national of another state (except denial of justice cases) where the municipal courts are competent under municipal law,[84] or matters arising out of the application of conventions to which third states are parties or may have adhered.[85]

The seventh group of agreements in the list of those made since 1919, including conciliation conventions or combination conciliation-arbitration engagements, reveal the greatest departure from the use of old formulae. Exclusive of engagements mentioned above, some forty bipartite conventions of the kind had been registered with the League Secretariat by 1927. Between 1919 and 1922 there were a few instances in which conciliation agreements had been made, but not all of these prescribed obligatory arbitration for cases where conciliation failed to lead to a settlement.[86] Later agreements, made in pursuance of the plan approved by the Third Assembly of the League, go further in an effort to provide for all possible disputes arising between the signatories. One group of conventions, made "in accordance with the spirit of the Covenant," to which Sweden, Norway, Denmark, Lithuania, Estonia and Latvia are parties, were intended to assure conciliation procedure for questions not arbitrable; [87] since there was no accompanying provision making arbitration definitely obligatory, reserve clauses are not found in them.[88] Of the remaining treaties, the series concluded by Switzerland between 1921 and 1926, and the Locarno arbitration conventions, are the most conspicuous.[89] The Swiss treaties vary as to the scope

[82] *Cf.* L. N. T. S. No. 1373.

[83] Convention of friendship and good neighborly relations, between France and Turkey (L. N. T. S. No. 1285), Article XIV.

[84] L. N. T. S. Nos. 384, 715. In other instances there is provision for delay in consideration, but not exclusion, of such disputes (L. N. T. S. Nos. 1192, 1235, 1242, 1417, 1418, 1420).

[85] L. N. T. S. No. 888; but an apparently opposite rule is sometimes laid down (*e.g.*, in L. N. T. S. No. 1374, Article 20).

[86] 112 British and Foreign State Papers, 717 (Great Britain-Chile); L. N. T. S. No. 111 (Chile-Sweden); L. N. T. S. No. 116 (Great Britain-Brazil); L. N. T. S. No. 320 (Germany-Switzerland); L. N. T. S. No. 322 (Poland-Switzerland). Three of these treaties did include an obligation to employ further methods of settlement, should conciliation fail. The Swiss-German treaty made arbitration obligatory for questions found by arbitrators not to affect either party's "independence, the integrity of its territory, or other vital interests of the highest importance." The British-Brazilian treaty prescribed arbitration, but only under a convention containing a broad reservation clause. The Swiss-Polish engagement called for reference to the Permanent Court of International Justice as a last resort, but the engagement covered only disputes as to interpretation or execution of a single commercial convention.

[87] L. N. T. S. Nos. 717, 731, 751, 839, 840, 842, 952, 1123, 1364.

[88] These conventions are now supplemented by the conventions for the pacific settlement of disputes (Note 78, *supra*).

[89] The Swiss treaties, texts of which are to be found in the League of Nations Treaty

of disputes covered. Under some of them (those with Germany, Sweden, Denmark and Austria) disputes found to be over non-legal questions might find no procedure with a view to *settlement* obligatory, since if conciliation fails or the conciliation commission's report is not accepted by the parties, there is no further obligation imposed; the treaty with Poland contains an obligatory arbitration clause to become operative if conciliation fails, but excludes domestic questions; treaties with Hungary, Belgium and Norway provide obligatory judicial settlement where conciliation fails, but only for questions found by the Permanent Court of International Justice to be of a legal order; treaties with France, Italy and Greece attempt to cover every possible dispute, providing obligatory conciliation as the first step, to be followed by obligatory judicial settlement (in the case of the Italian and Greek treaties) or by procedure either judicial or arbitral (in the case of the French treaty).[90]

Under the Locarno arbitration conventions,[91] the whole body of possible disputes arising between the signatories is divided into two general classes: (1) disputes in which the parties are in disagreement as to their respective rights (for which judicial settlement or arbitration is obligatory); (2) all other disputes (which must be submitted to the procedure of conciliation and, this failing, to the League Council for such action as that body may be authorized to take under Article 15 of the Covenant). Excepted from the first class, but not from the second, are "disputes arising out of events prior to the present conventions and belonging to the past." Classification of any dispute is determined by an arbitral or judicial agency. One of the traditional reserves in arbitration conventions, excluding questions in which the interests of third states are involved, is definitely discarded. The way in which the parties are obligated to proceed for the settlement of non-juridical questions leaves open the possibility of the Council's deciding that a given question is, in accordance with Article 15, paragraph 8 of the Covenant, a "domestic" one, which cannot be considered further in the exercise of power given under Article 15. But the powers of the Council under Article 11 of the Covenant could still be employed.

The few remaining treaties in the list of post-War compacts follow the general lines of the Locarno conventions, but with a few variations in the matter of reserves.[92] Perhaps the most significant tendency which these

Series, some of them also in the Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations (C. 34. M. 74. 1926. V), are discussed in Schindler, *Les Traités de Conciliation et d'Arbitrage conclus par la Suisse.*

[90] Where a dispute is not of a legal nature, settlement by the court is to be *ex aequo et bono.*

[91] L. N. T. S. Nos. 1293, 1294, 1295, 1296.

[92] Worthy of special note are several conventions concluded by Germany and by Czechoslovakia. Treaties made by the former state provide for settlement by arbitration of the *nature* of a dispute, when one party pleads that the question at issue is one which affects its independence, the integrity of its territory, or other vital interests of the highest importance, and the other party does not recognize that this plea is well founded (L. N. T. S. Nos. 320,

treaties reveal is that toward general recognition of the fact that, where reserve clauses are employed, they should be applied and given effect as to any particular controversy, not by each interested party for itself, but by an arbitral or judicial agency, authorized to decide the preliminary question of whether any given question is a "domestic" one, or when any other stated reserves become operative. Under the Locarno conventions, for example, the range of arbitrable disputes is extended to the widest degree considered consistent with national sovereignty; but the limitation recognized is given the same sanctity as any other feature of the agreements.[93] Not the pretensions of interested states, but the essential nature of questions at

1036, 1070). The same treaties provide that they shall not be inapplicable merely because third states are concerned, that they are to cover disputes having their origin in the past with the exception of those arising directly out of the World War, and that there shall be the usual delay in reference of questions which, according to the municipal law of one state, are within the jurisdiction of its municipal courts. The treaty which Germany made with Denmark, coming into effect in 1927, does not contain the clause in regard to vital interests mentioned above (L. N. T. S. No. 1444). One of the Czechoslovak treaties (with Poland, L. N. T. S. No. 1171) contains a reserve unusual in this type of treaty, specifying that "the provisions of the present treaty shall not apply to questions regarding territorial status of the contracting parties"; and in a final protocol the parties "agree that any difference of opinion as to the desirability of modifying in any way their territorial status, constitutes a form of dispute such as is only capable of settlement by an agreement, freely entered into between themselves, and that, consequently, there is no occasion to provide for an organ competent to deal with such cases." The treaty of conciliation and arbitration between Czechoslovakia and Sweden provides for reference of questions, as a last resort, where conciliation has been tried and has failed, to the League Council for action under Article 15 of the Covenant (L. N. T. S. No. 1159). Other treaties require arbitration of such questions on request of one party (L. N. T. S. Nos. 1434 and 1437 for examples). All of these treaties permit delay in reference of disputes within the jurisdiction of municipal courts, according to municipal law, with the exception of denial of justice cases.

[93] That the object of Article 15 of the Covenant is to exclude arbitration (or any procedure which would result in a binding judgment) for "domestic" questions, seems clear from the following pronouncement of the Permanent Court of International Justice:

"Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council. The reservations generally made in arbitration treaties are not to be found in this article.

"Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of states; this reservation is to be found in paragraph 8 of Article 15. Without this reservation the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8, the League's interest in being able to make such recommendations as are deemed just and proper in the circumstances with a view to the maintenance of peace must, at a given point, give way to the equally essential interest of the individual state to maintain intact its independence in matters which international law recognizes to be solely without its jurisdiction" (P. C. I. J., Series B, No. 4, pp. 24, 25).

That, in such cases, there is to be no denial of the League's right to take "whatever action may be deemed wise and effectual to safeguard the peace of the world," is made clear in the Locarno Treaty of Mutual Guaranty (Article 7), incorporated by reference into the several bipartite arbitration conventions of Locarno.

issue (to be determined by a body presumably impartial, although the method of procedure so far perfected seems open to some valid objections) will determine classification.

7. SUBSTITUTES FOR OLD FORMS OF RESERVATION CLAUSES

While the extreme forms of reservation clauses and the arbitrary method of their application (by each interested state for itself) have in the past operated to keep arbitration on a substantially voluntary basis, the discarding of old phrases does not seem to remove the essential problem. The view of a French publicist that recent experience has done little to show that obligatory arbitration promises are anything more than illusions has perhaps some support in actual fact.[94] The things which states sought to protect, through reservation clauses after 1890, under the description of "honor," "vital interests," "independence," "integrity," "existence," "constitutional principles," and the like, were not all imaginary. They seem rather to suggest the minimum of assurance which must be furnished to sovereign bodies subscribing to an obligatory arbitration arrangement. If not made the subject of reservation clauses to be interpreted and applied by each party for itself, they must be protected through some other agency; otherwise, the disregarding of obligations would appear to be inevitable. That, if all formal reservation clauses are to be given up and arbitration is to be made obligatory for all "arbitrable" questions, there must be some international supervisory agency capable of preventing the arbitrary classification of questions as "arbitrable," and capable of assuring the exclusion of questions found to be "domestic" after an impartial investigation of their nature, appears to be the lesson of experience with arbitration engagements during the past half-century. The most advanced treaties (using the term to designate those making the nearest approach to an obligatory arbitration system) made between 1919 and 1927 seem to suggest a growing belief that the League of Nations, which has undertaken the operation of a plan for obligatory mediation and has provided agencies for passing upon the nature of controversies, is capable of supplying the prerequisite for more far-reaching treaties for obligatory peaceful settlement. On the other hand, experience with the Protocol of Geneva, the reported unwillingness of certain great Powers to enter into even bipartite arrangements for general obligatory arbitration, even under League supervision, and the apparent disregard of obligatory arbitral agreements by other states, seem to indicate a still insufficient confidence. In any case, if there is to be further general progress toward a practical system of obligatory arbitration, it seems inevitable that it shall be related to the League or to some other international agency able to supply an adequate substitute for the old formulae protecting national honor and vital interests.

[94] Dupuis, *"La Crise de l'Arbitrage Obligatoire," Revue Politique et Litteraire (Revue Bleue)*, 1927, No. 4, p. 97. The writer believes that there is danger of discrediting voluntary arbitration through placing a too great and unjustifiable confidence in obligatory arbitration.

THE INTERPRETATION OF MULTILATERAL TREATIES

By Quincy Wright

of the Board of Editors

Numerous interpretative notes were exchanged by the Powers prior to signature of the General Pact for the Renunciation of War on August 27, 1928.[1] Secretary Kellogg was reported to have said on August 8 that these interpretations "are in no way a part of the pact and can not be considered reservations. The interpretations will not be deposited with the text of the treaty."[2] It has, however, been asserted that "the interpretations and declarations, made in the diplomatic correspondence before the signature of the treaty, and either agreed to or not dissented from, are just as binding and just as much within the meaning of the treaty as if they were written into the treaty text."[3] This obviously denies any importance to the distinction between interpretative notes and reservations implied in Secretary Kellogg's statement.

With reference to this particular treaty, the issue does not seem to be of great importance. The significance of the peace pact is in the field of politics and public opinion rather than in that of law. It is not likely to come before a court for precise interpretation and application.[4] In practice, any party is likely to be denied the benefit of the pact if it resorts to violence against another party under circumstances which the average politician, newspaper editor or man in the street of a disinterested country thinks amounts to recourse to war "for the solution of an international controversy" or "as an instrument of national policy." Justifying arguments based on self-defense, regional understandings, existing guarantees or previous violation of the anti-war pact itself may prove acceptable to such an audience, but if they do, it will not be because of references in the preliminary correspondence. The intrinsic reasonableness of the action in the light of the particular circumstances or more subtle factors in the realm of sympathy, sentiment and policy will control the public opinion of the world, upon which alone the pact rests. If the instrument proves effective, it will be because it presents a standard about which public opinion can organize, and the standard will in practice be the simple formula of the text, not the complex discussions of

[1] The General Pact for the Renunciation of War, text of the pact as signed, notes and other papers, Washington, Government Printing Office, 1928. See also Shotwell, "The Pact of Paris with Historical Commentary," International Conciliation Pamphlet, Oct. 1928, No. 243; War as an Instrument of National Policy and Its Renunciation in the Pact of Paris, New York, 1928; and Supplement to this Journal, Oct. 1928 (Vol. 22), p. 171.

[2] Miller, The Peace Pact of Paris, N. Y., 1928, p. 118; Foreign Policy Association, Information Series, Nov. 9, 1928, The Anti-War Pact, p. 372; U. S. Daily, Aug. 9, 1928.

[3] Miller, *op. cit.*, p. 119.

[4] But see Miller, *op. cit.*, p. 144.

the notes. The prospects of such effectiveness will doubtless be greatly increased if international institutions for preventing war and settling international disputes are extended and strengthened.[5] Such institutions will undoubtedly furnish the means for refinements of interpretation impossible for public opinion, unorganized or organized *ad hoc*, but such refinements will inevitably be based on texts and precedents of far more precision than this treaty, even with the explanatory notes.[6]

The following discussion is thus not of great practical importance for the Kellogg Pact. There are, however, an increasing number of multilateral treaties with a more definitely legal significance. Many of them contain express provisions for resort to arbitration or judicial settlement in their interpretation. What standard does international law provide for the interpretation of such treaties? And particularly, what weight does it attach to preliminary correspondence? Treaties are documents expressing the intention of legal personalities, and the principles of internal law developed for determining the true meaning of statutes, contracts, wills and other documents may be in part applicable.[7]

[5] M. Briand recognized in his address on signature that the pact itself did not organize a machinery for peaceful settlement. "Peace is proclaimed; that is well; that is much; but it still remains to organize it. In the solution of all differences, right not might must prevail; that is to be the work of tomorrow." International Conciliation, No. 243, p. 520. Shotwell considers Secretary Kellogg's interpretation that each Power "alone is competent to decide whether circumstances require war in self-defense" as the "real reservation to the pact." *Op. cit.*, p. 217.

[6] Miller, however, finds in Article 2 of the pact by which the parties agree that "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them shall never be sought except by pacific means," a formula for precisely determining breaches of the treaty. Assuming that this requires pacific settlement of all disputes, if war occurs, he writes, "the treaty is broken by the party (conceivably though not likely both of them) that did not try for pacific settlement" (p. 126). Thus he finds in the pact a prohibition of aggressive war as defined in the Fifth Assembly of the League—resort to war following a refusal to arbitrate. (The same definition is in the Geneva protocol, the Locarno treaty and the Capper resolution introduced in the Senate Dec. 16, 1927. Wright, this JOURNAL, Vol. 19, pp. 88, 95; International Conciliation pamphlet, No. 242, pp. 422, 441.) This, however, Mr. Miller recognizes, is all based on the assumption, hardly justified by a literal interpretation of the text, that "one party favoring the *status quo*" may not "simply remain passive, refrain from any attempt at settlement of the claims set up by the other state and decline any and all pacific means of adjustment which might be suggested" (p. 124). Miller in fact, later, seems to admit just this procedure as permissible under the treaty (pp. 138–139). Secretary Kellogg has stated that there is no definition of aggression in the treaty. Note to France, Feb. 27, 1928, and address to Council on Foreign Relations, N. Y., March 15, 1928, in which he endorsed Sir Austen Chamberlain's assertion that attempts to define the aggressor are "a trap for the innocent and a signpost for the guilty." The General Pact for the Renunciation of War, *op. cit.*, pp. 19, 64. Shotwell seems to think this definition is implied though he admits it is not expressed. *Op. cit.*, p. 210.

[7] "Both publicists and international tribunals incline to the view that the universally accepted principles of interpretation of private law contracts and statutes may be applied

Internal law systems have recognized two methods for the interpretation of documents.[8] The first utilizes concrete acts and utterances applicable to that particular document, and has been variously called "historical"[9] or "legal"[10] interpretation. It includes the "authentic" and "usual" interpretation of the civilians which designate, respectively, express statements of the authority responsible for the instrument and their practice in applying it. The second method of interpretation utilizes generally accepted definitions and principles of law, language, logic, and reason, and was called "doctrinal interpretation" by the civilians.[11] Doctrinal interpretation is usually divided into "grammatical," which looks to the literal meaning of words and phrases,[12] and "logical," which construes them so as to give effect to the spirit or general intention of the document as disclosed by its content as a whole, by its preamble, or even by extrinsic evidence.[13] Logical interpretation may be restrictive or extensive according as it narrows or broadens the literal meaning of terms.[14]

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to the interpretation of treaties." Lauterpacht, Private Law Sources and Analogies of International Law, London, 1927, pp. 178–179.

[8] Holland, Jurisprudence, 11th ed., pp. 418–419.

[9] Gsell-Trumpi, *Zur Rechtlichen Natur des Völkerbundsmandate*, Glarus, 1928, p. 11.

[10] Holland, *loc. cit.*

[11] Holland, *loc. cit.* Lieber, Legal and Political Hermeneutics, 3rd ed., 1880, p. 239; Phillimore, International Law, 3rd ed., Vol. 2, p. 97, *et. seq.*

[12] Called by Lieber merely "interpretation."

[13] See Lieber, *op. cit.*, pp. 11, 44; Wharton, Commentaries on American Law, pp. 739–741, who calls this "construction" to be distinguished from "interpretation" as a question of law rather than of fact.

[14] Holland, *loc. cit.*; Salmond, Jurisprudence, London, 1902, p. 126 *et seq.* Wigmore (The Law of Evidence, Vol. 4, Sec. 2458) distinguishes "the standard of interpretation," or sense in which the terms are employed, from the "sources of interpretation," or materials for ascertaining the tenor of the Standard. He recognizes four commonly used standards, the popular (usage in the community at large), the local (usage in a special class of the community), the mutual (usage by the parties to a bilateral act), and the individual (usage by a particular person). A special type of the local standard might be the legal, or technical usage among lawyers.

Doctrinal interpretation assumes the legal or the popular standard, *i.e.*, that terms are used according to the dictates of law, grammar, logic and reason generally accepted in the community in question. Historic investigation is thus of value only to discover what their dictates were at the time, though in organic and constitutional documents it is frequently avoided even for that purpose, thus making it possible for the meaning of the instrument to evolve with the natural evolution of law, language, logic and ideas. (Wright, this JOURNAL, Vol. 14, p. 579).

Historic interpretation makes no such assumption, and utilizes historical material to ascertain whether a local, mutual or even individual standard was not employed in the particular document, rather than the legal or popular standard, and if so, what that particular standard dictated. Thus A and B may have agreed that in cable orders for the purchase of stock the word "not" shall be used or omitted contrary to the usual sense. The results of doctrinal and historic interpretation with respect to a contract based on such understanding would be opposite. Clearly in the case of contracts, the possibility of such a convention should be recognized and sought for, if the agreement of the parties is to be given effect, but

The written instruments most commonly before national courts are contracts and statutes, and systems of internal law commonly look mainly to concrete evidences of meaning in interpreting the former and to general principles in interpreting the latter. Express statements of the legislature which passed the statute, if made in the form of a new statute, would of course be an "authentic" interpretation cognizable by the courts, and official commentaries before the legislature when it acted would usually be considered important. But statements of intention or meaning in legislative debate, committee or correspondence have little weight.[15] The meaning must be found by applying law, grammar and logic to the text itself.[16] In the case of contracts, however, written or oral communications between the parties, or other evidence of peculiar usages of terms by the parties, in the business involved or in the locality, and historic data on the entire setting of the contract, are of importance.[17]

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in the case of a statute the legal or ordinary meaning of terms can be assumed. (See *infra* notes 16 and 17.)

[15] Wharton, American Law, pp. 749–750, citing Rex *v.* Whittaker, 2 C. and K., 640; Barbot *v.* Allen, 7 Ex. 616; U. S. *v.* Union Pacific R. R. 91 U. S. 72, *et al.* See also Wilberforce, Statute Law, London, 1881, pp. 105–106; Maxwell, On the Interpretation of Statutes, 6th ed., London, 1920, p. 5; Endlich, Interpretation of Statutes, 1888, Sec. 30.

[16] "The first and most elementary rule of construction (of statutes) is that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar, and from this presumption it is not allowable to depart unless adequate grounds are found either in the context or in the consequences which would result from the literal interpretation for concluding that that interpretation does not give the real intention of the legislature." Maxwell, *op. cit.*, p. 3. See also Salmond, *op. cit.*, p. 126 *et seq.* Wharton allows considerable weight to "national antecedents and conditions" at the time the statute or written constitution is made (*op. cit.*, pp. 411–412, 750–752), in which he is supported by most writers. They distinguish the *general history* of legislation and common law on the subject, which can properly be utilized to establish the legal meaning of terms, and the general intent of the legislature (by the mischief and remedy rule, Heydon's case, 3 Rep. 7b), from the *parliamentary history* of the act, which can not ordinarily be used. (Wilberforce, *op. cit.*, p. 107; Maxwell, *op. cit.*, p. 51; Endlich, *op. cit.*, Secs. 29–30.)

[17] Such evidence can be used only to discover the meaning or sense of the words and phrases used, *i.e.*, the fixed association between the symbol and some external object, not to discover directly the will or intention of the parties. "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used." (Denman, L. C. J., Riches *v.* Carstairs, 5 B. and Ad. 663 (1833).) With this limitation, however, the tendency of the law has been to allow continually wider latitude in the use of extrinsic evidence. The old rules against disturbing the clear meaning of terms and construction within the four corners of the instrument have tended to become obsolete, *i.e.*, the original tendency to insist upon the legal or the popular standard as against the local or mutual is becoming modified in the case of contracts. The legal or popular standard is still assumed for statutes, while the individual standard is valuable only for wills or other unilateral documents. Wigmore, *op. cit.*, Vol. 4, Secs. 2458, 2459, 2462, 2465, 2470, and *supra*, note 14. See also Wharton, *op. cit.*, p. 750, citing 1 Serg. and R. (Penn.) 27, 464; 11 Mass. 30; 12 Johns. (N. Y.) 77.

Are treaties analogous to statutes or to contracts? Text-writers and courts, noting that treaties register at least formal agreement of the parties and bind no one but the parties, have generally accepted the latter analogy. "The legal nature of private law contracts and international law treaties is essentially the same" writes Lauterpacht.[18] He adds that the analogy is not carried out completely, especially in the lesser effect which international law attributes to duress in the invalidating of agreements and the greater influence it allows to changed circumstances in justifying unilateral termination under the implied *clausula rebus sic stantibus*. These divergencies, however, he attributes to the undeveloped character of international organization, and suggests that they will tend to disappear as the international legal order evolves. From this analogy, writers have emphasized the importance of preliminary material for the interpretation of treaties. Hyde, for example, writes:[19]

> As the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formation of rules of interpretation can hardly serve a useful purpose. Times when proof is not to be had are rare. Even when it is wholly lacking, it is dangerous to impute to a state assent to a particular significance of the words of a treaty.

It has, however, been urged that some treaties at least bear a closer re-

[18] Lauterpacht, *op. cit.*, p. 156. See also U. S. *v.* D'Auterive, 11 How. 609. Wharton (International Law Digest, Vol. 2. p. 36), outlines the respects in which treaties resemble and differ from contracts. See also Moore, Digest of International Law, Vol. 1, pp. 250, 252. A treaty "possesses in ordinary the same essential qualities as a contract between individuals." France *v.* Venezuela, 1902, Ralston, Report, p. 44, cited in Ralston, The Law and Procedure of International Tribunals, 1926, p. 6.

[19] Hyde, "Concerning the Interpretation of Treaties," this JOURNAL, Vol. 3, p. 46 (1909), and International Law, Vol. 2, pp. 64, 68; Crandall, Treaties, Their Making and Enforcement, 2nd ed., 1916, Sec. 166; Ralston, *op. cit.*, p. 192 where numerous instances from the practice of arbitral tribunals are cited. See also Oppenheim, International Law, p. 700. Miller (Reservations to Treaties, 1919, pp. 89, 171; The Peace Pact of Paris, 1928, pp. 119–122), considers the difference between explanatory notes and reservations merely formal. "Considering that the evidence seems to show that the intention of the parties to the treaty of 1919, *as indicated by the records of the negotiation*, and by the subsequent attitude of the governments, was to admit the United States to such fishery, the tribunal is of opinion, etc." North Atlantic Fisheries Arbitration, Wilson, The Hague Arbitration Cases, p. 189. "The official preliminaries recited are to be considered as part of the treaty." Chile *v.* Peru, 1875, Moore, Int. Arbitrations, Vol. 2, p. 2092. In support of this the arbitrator cites statements from Wheaton (Lawrence 6th Am. Ed. p. 318, Dana ed., p. 329) and Field (Outlines of an International Code) to the effect that "All communications, written or verbal between the parties to a treaty, preceding its signature and relating to the subject thereof, are merged in the treaty," but the doctrine of merger would rather exclude consideration of such preliminary material on the theory that "the final and common intention of the parties which may have undergone change during the progress of the negotiations" is recorded by the written instrument alone. Crandall, *op. cit.*, sec. 166.

semblance to statutes than to contracts in their objects, in the methods by which they are made and in their legal effects.

A distinction which Oppenheim considers of "the greatest importance" is that between "law-making" and other treaties.[20] The law-making character of some treaties is recognized by most text writers and by the statute of the Permanent Court of International Justice, which names as the first source of law for the court "international conventions, whether general or particular, establishing rules expressly recognized by the contracting states." Oppenheim defines law-making treaties as those "concluded for the purpose of confirming, defining or abolishing existing customary rules, and of establishing new rules for the law of nations." Triepel says they record a "realization of identical aims," while contractual treaties record a compromise "on different and opposing ends."[21] Scelle writes that while contractual treaties are made "to realize a particular juridical operation" and "disappear as soon as that operation is realized, law-making treaties present an entirely different interest of stability and of generality. They aim to establish a rule of law and are true legislative acts."[22] Though none of these definitions is perhaps capable of precise application, they indicate a type of treaty which has been growing in importance, as indicated by a recently published list of 394 "multipartite international instruments of legislative effect" between 1864 and 1928.[23]

These treaties tend to resemble statutes as much in the methods by which they are made as in their objects. "The quarter of a century" writes Hudson, "between 1850 and 1875, saw the launching of an attempt to deal with the needs of the new world society by means of international conferences engaged in legislative activities, the results of which were embodied in multipartite international conventions. Such conferences became increasingly frequent before 1914 and their legislation was embodied in numerous instruments. They effected a big extension of our international legal order, and filled some of the gaps in our customary law." With the creation of new agencies under the League of Nations and the International Labor Organization, there has been "a great quickening of this legislative process in international affairs."[24] Though the principles of unanimity and ratification

[20] Oppenheim, *op. cit.*, Vol. 1, p. 654.

[21] Triepel, *Völkerrecht und Landesrecht*, 1899, p. 53; cited Lauterpacht, *op. cit.*, p. 158. See also W. Kaufmann, *Die Rechtskraft des Internationalen Rechtes und das Verhältnisse des Staatsorgan zu demselben*, Stuttgart, 1899, p. 31; Jellinek, *System des Subjectiven Rechtes*, pp. 195–196, says "such unions are not in the character of contracts for they shape no *jus intra partes* but a *jus supra partes*."

[22] Scelle, *Le Pacte des Nations et sa liaison avec la traité de paix*, Paris, 1919, p. 49, cited Gsell-Trumpi, *op. cit.*, p. 10.

[23] Hudson, this JOURNAL, Supp., April, 1928, Vol. 22, pp. 90–108. See also Hudson, Cornell Law Quarterly, 1925, Vol. 10, p. 433; Gsell-Trumpi, *op. cit.*, p. 10, and Lauterpacht, *op. cit.*, pp. 35, 157–169, who somewhat questions this distinction.

[24] Hudson, "The Development of International Law since the War," this JOURNAL, April, 1928, Vol. 22, pp. 340–341.

are usually, but not always adhered to in this procedure, and though such instruments generally bind only the parties to them, in practice the procedure tends to resemble that of a legislative body, with its secretarial staff, committees, debates and votes.[25]

The legal effects of such treaties are also worth noting. While contractual treaties of the older type usually called for such things as military assistance, payments of money, withdrawal from territory, observance of rules of capture at sea, or other action of an executive character, law-making treaties frequently govern the day-to-day conduct of individuals and a wide range of administrative officials. Thus their proper execution requires the continuous action of internal law, and states have tended to follow the example of the United States in giving them automatic effect as internal law within the territory.[26] In that case, for the domestic courts and administrative officials they appear in the same light as statutes.[27] Strictly speaking treaties as such bind states and only states, and each state can use its own methods for carrying out their terms in its territory.[28] But practically, the task of carrying out complicated multilateral treaties would be almost insuperable unless the courts and administrative officials whose coöperation is essential have authority to apply them and to interpret them like statutes by uniform principles.[29]

[25] Hill, "Unanimous Consent in International Organization," this JOURNAL, April, 1928, Vol. 22, p. 319 *et seq.*; Knudson, Methods of International Legislation, Geneva, 1928. The principle that only parties are bound, tends to give interpretative statements by single parties the character of conditions and so to increase their importance, but this effect is less in a conference than in a diplomatic negotiation, and less still where unanimity is not observed in the preparation of a draft convention.

[26] Wright, "The Legal Nature of Treaties," this JOURNAL, Oct., 1916, Vol. 10, pp. 708, 717; Picciotto, The Relation of International Law to the law of England and of the United States of America, 1915, c. 4.

[27] "All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." U. S. Constitution, Art. VI, Sec. 2. "It is a rule in construing treaties as well as laws, to give reasonable meaning to all their provisions, if that be practicable." Geofroy *v.* Riggs, 133 U. S. 258, 270 (1890); Moore, Digest, Vol. 5, p. 249. There is danger that the habit of looking upon treaties as national legislation will cause them to be looked upon as nothing else, as noted by John Jay. "Some insist and profess to believe that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors as well as new truths often appear. Those gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which should be binding on them absolutely but on us only so long and so far as we may think proper to be bound by it." (The Federalist, No. 64, Ford ed., p. 431.)

[28] Oppenheim, International Law, 3rd ed., Vol. 1, p. 577; Wright, "International Law in its Relation to Constitutional Law," this JOURNAL, Vol. 17, pp. 240–241 (1923). The Japanese jurist, Hozumi, devotes a chapter to treaties in his Principles of the Constitution (Kempo Taiyo, 1910, part 5, Chap. 8, pp. 763–786), in which he argues that treaties are contracts between states and not commands of the state to its subjects. While the state ought to assure obedience to its treaties by its subjects, the act giving this assurance is juridically distinct from that making the treaty, though they may be formally the same. (The writer was supplied a translation of this chapter by Mr. Sterling H. Takeuchi.)

[29] For this reason some writers hold that law-making treaties necessarily are law within

The general and permanent objects aimed at by law-making treaties, the complicated procedure by which they are made, and the internal law effect often attributed to them, all suggest an analogy to statutes, and the propriety of resort to interpretative materials which all states can be presumed to have accepted in advance, which will assure uniformity of application and which will permit of adaptation to changing conditions. Reliance on preparatory work or on national rules of interpretation would probably result in applications contrary to the intent of some of the parties, would certainly interfere with the generality, uniformity and permanence of the instrument's applicability, and would militate against effective administration of the instrument by courts and officials in the various countries. It has thus been urged that such treaties must be interpreted by doctrine rather than history.[30] Some writers have even urged such a standard for the interpretation of all treaties. "What," writes Sir Robert Phillimore, "is meant by the term 'interpretation?' The meaning which any party may choose to affix? —or a meaning governed by settled rules and fixed principles, originally deduced from right reason and rational equity and subsequently formed into laws? Clearly the latter."[31]

The line between contractual treaties and law-making treaties is not a sharp one any more than is that between internal contracts and statutes.[32] The use of internal law analogies in their interpretation is not, however, precluded. After all, the object of both contract and statute interpretation is to find the real meaning which those who made the instrument put in it. The differences in method ultimately result from the fact that contracts are usually made by two or a small number of persons to fit special circumstances, while statutes are made by a large body to fit a wide variety of circumstances. Consequently, preliminary conversations and subsequent actions usually furnish sufficient evidence of the intention of all the makers of a contract, while legislative debates seldom indicate the full intention of all the makers of a statute. It can not be assumed that an exposition of a bill by one legislator discloses his full intention with respect to it, much less that it indicates the intention of all other members of the legislature. Even those who heard such an exposition without protest and then voted for the bill can not be presumed to have endorsed the arguments. Furthermore, contracts

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the states united by that legal order, in the same way as national law is law within all the states of a federation. Kaufmann, *op. cit.*, p. 31. The same seems to flow from the Declaration of the Rights of Nations of the American Institute of International Law, 1916, that "International law is at one and the same time both national and international." Even states, like England, which do not automatically attribute to treaties internal legal effect, usually provide for such effect by special legislation, and Kaufmann (*loc cit.*) regards this as the final step in making the treaty. After exchange of ratifications the treaty is concluded (*abgeschlossen*), but not till this final act is it in force (*Vollziehbar*).

[30] Gsell-Trumpi, *op. cit.*, p. 11.

[31] Phillimore, International Law, 3rd ed., Vol. 2, p. 95.

[32] The constitutions of corporations have in private law characteristics of both statutes and contracts. See Lauterpacht, *op. cit.*, p. 157.

are often drafted by persons unused to the precise expression of their meaning; thus the prospect of correctly discovering the latter by the application of general rules is not good. Statutes, on the other hand, are more likely to be drawn with deliberation and knowledge of the purport of legal phraseology. In general, it would seem that instruments made by many persons through an elaborate procedure to cover a wide range of circumstances, some of them only dimly or not at all foreseen, can most reasonably be interpreted by general rules developed by experience, utilizing historic evidence with respect to the specific document only when "authentic" in the sense of having been formally approved by the makers of the document, when necessary to disclose its general purport and the contemporary use of terms, or when ambiguities, inconsistencies or manifest errors can not be resolved by a thorough consideration of the whole text.[33]

The practice in regard to treaty interpretation seems to follow this distinction. Courts, arbitrators and diplomats have given great weight to preliminary material in the interpretation of bilateral treaties.[34] Thus, in spite of its established practice of interpreting most-favored-nation clauses conditionally, in 1900 the United States admitted the unconditional interpretation of such a clause in the Swiss treaty of 1850 on the basis of correspondence of the negotiators. "Both justice and honor," wrote the Secretary of State, "require that the common understanding of the high contracting parties at the time of the execution of the treaty should be carried into effect."[35] But that such materials do not have the weight of formal reservations is indicated by discussion in regard to the effect of notes interpreting the American treaties with Mexico (1848) and Great Britain (1850) exchanged at the time of exchange of ratifications. These notes had not been before the Senate when it consented to ratification of the treaties, and though Mexico and Great Britain considered them binding interpretations, the United States refused to do so.[36]

[33] This in general follows the accepted view of statutory interpretation. (*Supra*, notes 15, 16.) Salmond insists on keeping close to the text of statutes to avoid substituting the will of the interpreter for the will of the legislature. He thinks it would be improper to say that the legislature "did not say what it meant or mean what it said" (*op. cit.*, p. 127). Gsell-Trumpi urges an avoidance of historic materials which would limit an instrument intended to be permanent and general by particular circumstances (*op. cit.*, p. 11). Wharton says "laws are evolved in large measure unconsciously from the conditions in which the community is placed," and consequently what the makers say about it is not necessarily "equally authoritative with what they did and what caused their action." (American Law, pp. 410, 750.)

[34] *Supra*, note 19; *infra*, note 39.

[35] Moore, Digest, Vol. 5, p. 284; Wright, "Amendments and Reservations to the Treaty," Minn. Law Rev., Dec. 1919, p. 28. All of the cases cited by Crandall on the use of preliminary material relate to bilateral treaties (*op. cit.*, Sec. 166).

[36] Moore, Digest, Vol. 3, p. 138, Vol. 5, pp. 205–206; Crandall, *op. cit.*, pp. 85, 381; Bigelow, Breaches of Anglo American Treaties, pp. 116–149, discusses at length the effectiveness of these and other documents alleged to be explanatory of the Clayton-Bulwer Treaty. The Mexican agreement is printed in Malloy, Treaties, etc., p. 1119. See Wright, Minn. Law Rev., Dec. 1919, pp. 16, 22.

With respect to multilateral law-making treaties, however, it is not common to utilize preliminary materials except in so far as incorporated in reservations formally attached to the instrument on signature or ratification, and accepted by the other parties to the convention.[37] During the World War the French prize court even refused to accept the report of the drafting committee as a conclusive interpretation of the Declaration of London. "The clear and precise provisions of an article which the state had adopted, though the declaration itself had not been ratified, could not be weakened by any extraneous document."[38] In the Tunis nationality decrees case the Permanent Court of International Justice paid no attention to peace conference discussion introduced by France in support of a particular interpretation of paragraph 8, Article 15, of the League of Nations Covenant. Instead, the paragraph was interpreted by textual analysis and general principles of law. The same was true with respect to the Roumanian effort to interpret the Definitive Statute of the Danube by preliminary material. The court recalled "that preparatory words should not be used for the purpose of changing the plain meaning of the text," and refused to consider confidential preparatory material at all.[39] The League council has expressly ruled that reservations to multilateral treaties must be made at signature and can not be attached to accessions. The International Labor Office has similarly ruled that labor conventions resulting, as they do, from a process assuring proper consideration of the interests not only of states but of industrial classes, must be considered as *ne varietur* documents.[40] Multilateral treaties have sometimes by their own terms prohibited reservations,[41] or

[37] Reservations and interpretations of the Hague conventions were in all cases formally submitted at signature or exchange of ratifications. See Scott, Reports to the Hague Conferences of 1899 and 1907, pp. xxv–xxviii; Wright, Minn. Law Rev., Dec. 1919, pp. 21–25; Miller, Reservations to Treaties, p. 154.

[38] The Federico, *Conseil d'Etat*, July 18, 1916, Hall, International Law (Higgins), 8th ed., p. 823; Garner, Prize Law During the World War, pp. 614–616.

[39] Publications of the Permanent Court of International Justice, Ser. B, No. 4, pp. 23–25; No. 14, pp. 31–35; Ser. C, No. 2, pp. 75–82. In general, the Permanent Court of International Justice has relied on textual analysis and legal principle for interpreting treaties (Ser. B, Nos. 2 and 3, p. 41; No. 6, p. 37; No. 7, p. 20; No. 13, p. 14), though it has sometimes cited preliminary material in interpreting provisions of bilateral treaties or provisions of multilateral treaties affecting only two states. (*Ibid.*, Ser. B, No. 10, pp. 10, 22; No. 11, pp. 37, 40; No. 12, p. 22.) As an exception may be noted the reference to an earlier draft of the mandate for Palestine to confirm a conclusion reached from the text itself. (*Ibid.*, Ser. A, No. 2, p. 24.) In the case of the Muscat Dhows the Hague Arbitration Tribunal held that the terms of the General Act of Brussels, 1890, if not expressly defined, "must be understood in the sense which corresponds best as well to the elevated aims of the conference and its Final Act, as to the principles of the law of nations, as they have been expressed in the treaties existing at that time, in internationally recognized legislation and in international practice." Crandall, *op. cit.*, p. 395. Only rarely have the peace conference debates been cited in discussion by the League organs of the meaning of the articles of the Covenant.

[40] League of Nations Official Journal, Vol. 8, pp. 770, 800, 880–884. (Minutes 45th Session of the Council, 1927.)

[41] Declaration of London, Art. 65, and Renault's report thereon; Protocol No. 24 of the

permitted them only for specified articles.[42] The misunderstandings which would result from reservations or interpretations of such treaties, made in any but the most formal manner and with full opportunity for consideration by the ratifying authority in all the states, has been fully appreciated.

Thus, with respect to interpretation it seems both reasonable and in accord with practice to regard treaties between two or a small number of states as analogous to contracts, while multilateral law-making treaties bear more resemblance to statutes. The latter analogy seems especially applicable to multilateral treaties open to general accession, since the acceding states are usually officially cognizant only of the text and formal reservations and can not be supposed to have accepted interpretations suggested in the preliminary conversations of the original negotiators.

The Kellogg Pact is not in precisely this class, because even the acceding Powers have, though rather informally, been apprised of the preliminary correspondence.[43] Thus it can not be said that the interpretative notes are without weight. The manner of their presentation and the express or tacit acceptance of most of them by the original signatories precludes such a conclusion. It is believed, however, that they are to be treated merely as evidence of the sense of the text and not as modifications of or exceptions from it, or even as conclusive interpretations.

Preliminary correspondence in regard to a draft treaty may attempt to modify the obligations of all the parties, modify the obligations of particular parties, or interpret the text. The first and second, can, it is believed, be done, at least in the case of a multilateral treaty, only by a formal amendment or reservation accepted by all the parties, and if the notes do not acquire that status, they have no effect upon the text which has received formal ratification.[44] Notes purporting merely to interpret the text, may of course be formally accepted as reservations, in which case they are as binding as the text. They are in fact "authentic" interpretations. If they do not acquire this status, their importance depends on the character of the negotiation.

Paris Congress, 1856, with reference to the Declaration of Paris, Naval War College, International Law Topics, 1909, p. 155; 1905, p. 110; Wright, Minn. Law Rev., Dec. 1919, p. 20.

[42] See Convention, protocol and declaration concerning import and export prohibitions and restrictions, L. N. O. J., Vol. 8, p. 1653.

[43] The concluding paragraph of Secretary Kellogg's note of Aug. 27, 1928, to 48 Powers inviting their adherence reads: "I shall shortly transmit for your excellency's convenient reference a printed pamphlet containing the text in translation of M. Briand's original proposal to my government of July 20, 1927, and the complete record of the subsequent diplomatic correspondence on the subject of a multilateral treaty for the renunciation of war. I shall also transmit, as soon as received from my government, a certified copy of the signed treaty." The General Pact for the Renunciation of War, *op. cit.*, p. 56.

[44] On the principle that "assent must be given to the same thing in the same sense" to complete an agreement. Wright, Minn. Law Rev., Dec., 1919, p. 17; Miller, Reservations to Treaties, pp. 76–80. This interpretation was implied by the notes accompanying adhesion from Russia, Egypt, Persia, and Turkey. Foreign Policy Association, Information Service, Nov. 9, 1928, pp. 369, 373; International Conciliation, Oct. 1928, No. 243, p. 531.

In the case of bilateral treaties, such notes, if accepted or not protested by either party, have been regarded as authoritative. They indicate the meaning intended by the parties. In the case of multilateral treaties, however, there is a strong presumption that the terms of the text have the established meaning recognized throughout the family of nations. Such notes may furnish evidence of that meaning, but they are not conclusive of it.

In the present case it does not appear that any of the notes were intended either to amend the text or to give a privileged position to any of the parties. The only one suggesting such an intent is that in which Great Britain calls attention to:

> Certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a foreign power they have declared that they would regard as an unfriendly act. His Majesty's Government believed, therefore, that in defining their position they are expressing the intention and meaning of the United States Government.

Though this may seem to assert a special privilege for Great Britain and the United States, it can readily be read as an interpretation (reasonable in the light of Article 21 of the League Covenant) [45] that action in pursuit of any internationally recognized "regional understandings" is not within the prohibition of the treaty.[46] The gist of the other notes was summed up in

[45] "Nothing in this Covenant shall be deemed to affect the validity of . . . regional understandings like the Monroe Doctrine for securing the maintenance of peace."

[46] It is a truism to say that international law permits action in accord with *internationally recognized* regional understandings. The real problem is to determine whether an alleged regional understanding has really been internationally recognized. An established protectorate or a treaty, such as that between the United States and Cuba (1903), or a League of Nations mandate, would seem sufficient evidence, but whether unilateral assertion and practice, even if acquiesced in for a considerable time, will do so is more doubtful. See Wright, "The Outlawry of War," this JOURNAL, Jan., 1925, Vol. 19, pp. 90–91; "Territorial Propinquity," *Ibid.*, July 1918, Vol. 12, pp. 519–561; "The Distinction between Legal and Political Questions," Am. Soc. Int. Law, Proc., 1924, p. 63. Shotwell (*op. cit.*, pp. 213–216) seeks to justify the British note by pointing out that legitimate defense need not stop at the geographical frontier, for aggression "lies in the political conditions which are violated and not in the violation of actual territory." Defense, however, would cover any forcible measures whatever if each state were free to consider any disturbance of political conditions an aggression. Thus Shotwell recognizes that if the "territorial frontier" is abandoned as the test, a "juristic frontier" must be substituted, and such a frontier he finds in the popular definition of aggression as resort to hostilities without having utilized all procedures for pacific settlement to which the state has agreed to submit. Useful as this definition may be, and it has been accepted in a number of international documents, it is difficult to find

Secretary Kellogg's address to the American Society of International Law on April 28, 1928, as simply the application of established international law to the text of the treaty, and the address was sent to the Powers on June 23, 1928, with the invitation to sign.[47]

Thus, while it is believed the importance of the notes lie in the evidence they give of the interpretation which international law would accord to the text, in the opinion of the writer little exception can be taken to their interpretation. It would seem that use of force in self-defense, in pursuance of internationally recognized regional understandings, in fulfillment of guarantees recognized by treaty, or against a state which has itself resorted to war in violation of the pact, is not a resort to war "for the settlement of international controversies" or "as an instrument of national policy."[48]

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juridical justification for reading it into the Kellogg pact. (*Supra*, note 6.) Furthermore, it would hardly cover the case which Great Britain probably had in mind in her note. State A invades Egypt or the Hedjaz and yet, being bound by no pacific settlement agreement with those countries (neither of whom is a member of the League of Nations), would not be an aggressor under this definition and Great Britain would be precluded from interfering. For general purposes, the definition is too narrow in limiting aggression to the violation of pacific settlement treaties. To say, as does Shotwell, that "the definition of defense and of aggression is only a denial of improper means of redress; and no means are improper in the hands of a sovereign state unless it has previously renounced them by treaty with other nations," is to ignore the numerous limitations which customary international law imposes both on the methods by and the occasions upon which states may properly resort to force. (See this JOURNAL, Vol. 18, p. 756, Vol. 19, pp. 83, 94, *infra*, Note 48.) A State may have vital interests recognized and protected by customary international law alone and encroachment upon or immediate threat to such interests may constitute aggression and justify forcible measures of defense.

[47] Question might be raised with respect to Secretary Kellogg's assertion that "as a matter of law violations of a multilateral anti-war treaty, through resort to war by one party thereto, would automatically release the other parties from their obligation to the treaty-breaking state." That would not seem to be true of all multilateral treaties, as for instance the Hague Convention on Land Neutrality. (See Wright, "The Future of Neutrality," International Conciliation, Sept. 1928, No. 242, pp. 37–371.) But the point is specified in the preamble of the peace pact, which denies the benefit of the treaty to "any signatory Power which shall hereafter seek to promote its national interests by resort to war." This would seem to have authoritative interpretative value.

[48] Article 8 of the League of Nations Covenant recognizes "national safety and the enforcement by common action of international obligations" as the only legitimate uses of national armaments. Article 2 of the Geneva Protocol (1924) forbade resort to war "except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present protocol." The Locarno Treaty (1925) forbade attack, invasion or resort to war between Germany, on the one hand, and Belgium and France, on the other, except in:

"1. The exercise of the right of legitimate defense, that is to say, resistance to a violation of the undertaking contained in the previous paragraphs or to a flagrant breach of Arts. 42 and 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary.

"2. Action in pursuance of Art. 16 of the Covenant of the League of Nations.

"3. Action as the result of a decision taken by the Assembly or by the Council of the League of Nations, or in pursuance of Art. 15, par. 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a state which was the first to attack."

Grotius set forth three grounds of just war—defense, recovery of property, and punishment of wrong. "*Plerique bellorum tres statuunt causas justas, defensionem, recuperationem rerum, et punitionem.*" (*De Jure Belli ac Pacis*, lib. ii, c. i, 2, 2.) Practice indicates that apart from the fact of war, "the only circumstances in which modern international law recognizes the use of force as a legitimate procedure" are "(1) instant and overwhelming necessity for defense of territory or citizens (or government), (2) redress of properly validated legal claims (after available peaceful methods have failed), (3) prevention of flagrant violations of international law (immediately pending), (4) fulfillment of privileges expressly given by treaty (or established custom), and (5) enforcement of law within the state's own jurisdiction." Wright, "The Outlawry of War," this JOURNAL, Jan. 1925, Vol. 19, p. 94. For proposed definition of "aggression," which also amounts to a definition of "defense," see *supra*, note 6.

EDITORIAL COMMENT

IN MEMORIAM—ROBERT LANSING

When members of the American Society of International Law, especially those of long-standing, have heard the name of Robert Lansing mentioned, they have thought of him in connection with the Society of International Law rather than as occupying the highest positions of honor and dignity under the Government of these United States. This is as it should be. His public career belongs to the nation, but in a very personal and in a very intimate way he belongs to us of the American Society of International Law. Was he not present on the occasion when the formation of the Society was bruited? Was he not a member of the Committee of Organization? Did he not attend the first session and the last, and every intervening session when his health permitted and official duties did not prevent it?

In 1904 the undersigned, then a professor in the Columbia Law School, had the honor of making Mr. Lansing's personal acquaintance. He was invited to attend a gathering at which Mr. Lansing, just returned from London where he had served as counsel of the United States to the Alaskan Boundary Commission, was to deliver an address upon the commission's labors. The meeting was casual, the friendship life-long. In the succeeding year both were present at the Lake Mohonk Conference on International Arbitration, as were also Mr. Chandler P. Anderson and Mr. George W. Kirchwey. They acted as a self-appointed committee and availed themselves of the presence of a large gathering of persons interested in international law, international arbitration and international relations, including, among others, the late John W. Foster, at one time Secretary of State; the Honorable George Gray, for many years Senator from Delaware, and at that time Circuit Judge of the United States; and Oscar S. Straus, Minister and Ambassador of the United States to Constantinople, and soon destined to enter President Roosevelt's Cabinet as Secretary of Commerce and Labor.

In a reminiscent mood Mr. Lansing, when Secretary of State, said in an address at the banquet of the Society some years later:

> You will pardon me, I am sure, if I say that I have special reason to feel proud tonight on this tenth anniversary, because it was my fortune to be one of the founders of the Society. I well remember the May day nearly eleven years ago, when Dr. James Brown Scott and I sat in a little rustic summer house fastened to the cliffs which overhang Lake Mohonk and planned together this Society and the publication of a journal devoted exclusively to international law; I also remember how, when the plan was vaguely formulated, we sought the aid of the siren tongue of Professor Kirchwey, the cordial approval of Judge Gray and the en-

thusiasm of Mr. Straus to draw others into the movement; and how our combined efforts resulted in the appointment of a committee of organization, which later performed its labors so admirably.

Mr. Kirchwey, then Dean of the Columbia Law School, was asked because of his official position to propose the formation of an American Society of International Law which should have as its mouthpiece a journal of international law. This he did, and those interested in international law, international arbitrations and international relations were invited to consider the formation of the society and the publication of the journal. Of this committee Mr. Straus was chosen chairman, with the undersigned as secretary. It approved both suggestions and, at the proposal of Mr. Straus, Messrs. Chandler P. Anderson, Charles Henry Butler, John Bassett Moore and the undersigned, all then residents of New York City, met from time to time during the autumn, in order to discuss and to formulate plans. The result of these informal discussions was that a call was issued for those interested in the two projects to meet in the headquarters of the Bar Association of the City of New York on January 12, 1906. A large concourse of leading lawyers assembled at the chosen time and place and formed the American Society of International Law, with the Honorable Elihu Root, then Secretary of State, as its President. Mr. Lansing attended this session. In the course of the ensuing year arrangements were made for the publication of the AMERICAN JOURNAL OF INTERNATIONAL LAW, the first number of which appeared in January, 1907. Mr. Lansing was deeply interested in the proposed journal. He personally examined the leading magazines and professional journals; he chose the paper, the type, the format and the cover, and, through Mr. Root's good offices, the distinguished artist and war correspondent, Frank D. Millet, devised the seal.

None rejoiced more than Mr. Lansing in the success of the American Society of International Law, of which he was a founder and, from the date of its organization, an officer; none took greater pride than he in the AMERICAN JOURNAL OF INTERNATIONAL LAW, which he was pleased to consider the leading periodical of the science which, during many years both at home and abroad, he practised with distinction. But his interest did not cease with the launching of the Society or with the publication of its journal. He attended the annual meetings of the Society, occasionally reading papers and taking part in the discussions from the floor; and he was regularly present at its dinners, which from the very first were one of the most pleasing and coveted events of Washington, as the speakers have usually been persons of prominence, and epoch-making announcements have sometimes been made, culminating in Secretary of State Kellogg's address on April 28, 1928, at the Society's banquet, but really to the world at large, interpreting the sense in which the Pact for the renunciation of war as an instrument of national policy was to be understood. Mr. Lansing was present on this occasion—the last banquet of the Society, and the last which he was to attend. And

to the JOURNAL he contributed articles, editorial comments and book reviews. For a long period of years he was one of its editors, retaining this position during the World War, although he was then Secretary of State of the United States.

Present from the first session and at the last, Mr. Lansing, during a period of twenty-two years, came into personal contact with every member of the Society, all of whom feel that his death on October 30, 1928, was not merely a loss to the Society and the JOURNAL, but a personal loss to the members themselves. Did he not say in his address at the banquet of 1916, "I confess that, being in the family of the Society, I am abashed, as I always am in speaking before members of my family." Therefore, especially to the members of long standing, the American Society of International Law will never seem to be just what it was while Robert Lansing lived.

JAMES BROWN SCOTT.

THE BOLIVIA-PARAGUAY DISPUTE

The threatened war between Bolivia and Paraguay arising out of border clashes has been avoided, thanks to the mediation of the League of Nations and the Pan American Conference on Conciliation and Arbitration which has been meeting in Washington. The controversy arose over the unsettled boundary between the two countries in the great wilderness called the "Gran Chaco." The Gran Chaco, shaped like an arrowhead pointed at the heart of Paraguay, lies between the Paraguay and Pilcomayo Rivers, with its tip, at the junction of the two rivers, almost impinging on Asunción, the capital of Paraguay. The Gran Chaco has an area which has been estimated at about 100,000 square miles in extent. Efforts have been made to tame this wilderness, but swamps and desert areas make it somewhat unattractive for colonization. It is now inhabited chiefly by Indians. So far petroleum, or other important mineral deposits, have not been discovered, although it produces a great deal of *quebracho*, a scrub used as a source of leather-tanning liquid.

However, this tract must in time be valuable intrinsically. It adjoins the oil belt and its situation is at present chiefly important because of its bearing upon concessions and grants for the construction of rail and pipe lines from the oil fields to Paraguayan and Argentine river ports. Moreover, Bolivia and Paraguay, being without direct access to the sea, must rely on river transportation to the Atlantic Ocean.

This controversy is of long standing and has been the subject of discussion, for perhaps a century, the conflicting claims running back to the sixteenth century. There are several agreements between the countries regarding the area which it is impossible to review in detail here. It is sufficient for present purposes to refer only to a few of the more recent agreements. The Pinilla-Soler agreement of 1907 established a *status quo* area and provided for the

arbitration of the title to this area by the President of Argentina. This agreement drew an east-west line across the Gran Chaco at 20° 30′ south latitude extending from the Paraguay River to 61° 30′ west longitude and thence south to the Pilcomayo River. This line cuts the area roughly into two equal portions. That portion lying north of 20° 30′ south latitude and between 61° 30′ and 62° west longitude was to be submitted to arbitration by the President of Argentina. Presumably the portion south and east of the line was to belong to Paraguay, while that part lying west of 62° was to belong to Bolivia. The zone submitted to arbitration was to remain in *status quo ante* while the convention was carried out. On this point, the convention provided as follows:

> *Art. 7. Mientras se tramite el cumplimiento de este Convenio las Altas Partes Contratantes se comprometen, desde este momento, a no innovar ni avanzar las* posesiones *que en esta fecha existan. En ningún caso podrá cesar el statu quo antes de un año contado desde la fecha fijada por el artículo 3º. El statu quo será fielmente observado bajo la garantía del gobierno argentino.*[1]

While the convention of 1907 was apparently ratified, the *compromis* of arbitration was never concluded, it is said, because the Argentine President declined to act. There may have been a question as to whether the *status quo* continued in the circumstances, but this was clarified by the Ayala-Mujia protocol of 1913 between the two countries.

The protocol of 1913 provided for a direct settlement of the boundary between the two countries, and in the event of failure to negotiate such a settlement, the high contracting parties agreed to submit the question to arbitration. The continuation of the *status quo* and the termination of the 1907 convention were dealt with in Articles IV and V as follows:

> *Artículo IV. Mientras se lleve a cabo el arreglo directo, o se pronuncie el fallo arbitral, seguirá en vigencia el statu-quo estipulado en el Acuerdo de 12 de Enero de 1907, declarando ambas partes no haber modificado sus respectivas* posiciones *desde aquella fecha.*
>
> *Artículo V. En virtud de las cláusulas precedentes que modifican las estipulaciones del Acuerdo del 12 de Enero de 1907, las Altas Partes Contratantes convienen en declarar la caducidad de aquel Acuerdo.*[1]

It may be observed that the word *posesiones* (possessions) used in connection with the *status quo* of the convention of 1907 was changed to the word "posiciones" (positions) in the 1913 protocol. The difference in meaning between these two terms leaves it open for the parties to contend that up to 1913 they could not under the *status quo* agreement change their physical possessions in respect of the territory in dispute, while after 1913 they could not change their respective legal positions in respect of the disputed territory.

[1] *Ministerio de Relaciones Exteriores, Paraguay-Bolivia, Tratados y Protocolos,* Asunción, Paraguay, 1927.

However this may be, the parties were never able to come to a direct agreement regarding the boundary or to agree upon submission to arbitration under the 1913 protocol. In 1927, the two countries negotiated in Buenos Aires the Gutierrez-Diaz León protocol in which they accepted the good offices of the Argentine Government for the purpose of promoting a solution of the dispute. The protocol provided that both parties shall designate plenipotentiaries to meet in Buenos Aires to discuss and determine if possible the international boundary, and if an agreement as to the boundary could not be reached, the plenipotentiaries were to state the reasons for their disagreement and "fix the particular zone to which shall be applied the decision of an arbitral tribunal designated by common accord." The commission under this protocol had apparently been sitting for several months in Buenos Aires when the outbreak between the Bolivian garrison at Fort Vanguardia, in the disputed territory, and the Paraguayan soldiers occurred. There were further clashes at other points in the wilderness.

At the same time, efforts were made by the Pan American Arbitration Conference and the League of Nations to intercede. The result has been that on January 3, 1929, under the auspices of the Pan American Conference, the representatives of Bolivia and Paraguay signed a protocol in Washington providing for a commission of investigation of the recent incidents. The commission is to be composed of four national members and five neutral members, and must render its report within six months. It appears that, in its report, the commission is to determine responsibility, and to give advice on measures designed to prevent a recurrence of hostilities. The commission shall submit proposals and endeavor to settle the incident amicably and satisfactorily to both parties, but if this should prove to be impossible, the commission shall render its report setting forth the results of the investigation and the efforts made to settle the incident. Meanwhile hostilities and concentration of troops shall cease. No action of the commission, however, is to "include nor affect" the territorial question involved as contended by either side, or the agreements in force between them.

It would appear that the root of the trouble, that is the international boundary in the Gran Chaco, still remains untouched, as no new provision has been made in regard to it. L. H. WOOLSEY.

THE ANGLO-FRENCH ACCORD ON THE LIMITATION OF NAVAL ARMAMENTS

The third session of the Preparatory Commission for a Disarmament Conference drew important statements of national policy from the Governments of France and Great Britain in the spring of 1927. A sharp conflict of principle was revealed. In a draft convention submitted by Great Britain there was advocated the retention of the principle seemingly agreed upon at the Washington Conference of 1921–1922, namely, a limitation by category. In a word, the British proposition was that the fleet of a state should be divided into well-known classes (such as battle-ships, cruisers, aircraft-carriers,

destroyers, torpedo-boats, submarines, sloops, mine-sweepers and river gun-boats), and that each of the classes should be limited by numbers and by the size of the ships and the guns which those ships could carry.[1]

A draft submitted in behalf of the French Government provided that the limitation of the naval armaments of each of the contracting parties should apply to the total tonnage, that is, to the sum of the individual tonnage of all vessels capable of being employed as combatant units and regarded as vessels of war within the meaning of the proposed convention. Moreover, each of the parties was to be free to distribute and allocate such total tonnage as might be best for the purposes of security and defense of its national interests.[2] These views were stoutly advocated by the representatives of the states asserting them; the United States and Japan opposing the French theory,[3] and Italy [4] supporting it.

While the Preparatory Commission was seeking to effect a compromise, important conversations were being held between the Foreign Ministers of France and Great Britain and between their respective experts with a view to surmounting the obstacle that separated them.[5] These efforts proved successful. They resulted in formal correspondence productive of an accord.[6] This contemplated a limitation of surface vessels of or below 10,000 tons armed with guns of more than 6-inch and up to 8-inch calibre, and of so-called "ocean-going" submarines, meaning those over 600 tons. The plan placed no restriction on the construction of cruisers of or below 10,000 tons mounting 6-inch guns, or on the construction of submarines of not over 600 tons.

This basis of accord was submitted to the Government of the United States in the summer of 1928. On September 28, 1928, Ambassador Houghton gave to Lord Cushendun the American response. It deserves attention. It maintained that "any limitation of naval armament, to be effective, should apply to all classes of combatant vessels." [7] It was said that it could not be claimed that the types of vessels left without limitation (6-inch-gun cruisers or destroyers, or submarines of 600 tons or less) were not highly efficient fighting ships, and that no one would deny that modern cruisers armed with 6-inch guns, or destroyers similarly armed, have a very high offensive value, especially to any nation possessing well distributed bases in various parts of the world. Such cruisers, it was said, "constitute the largest number of fighting ships now existing in the world." It was declared that the limitation under the Anglo-French understanding would be an imposition of restrictions "only on types peculiarly suited to the needs of the United States," and that

[1] Extract from a speech by Viscount Cecil, at 18th public meeting, April 5, 1927. Misc. No. 6 (1928), Papers regarding the Limitation of Naval Armaments (Cmd. 3211), p. 7.

[2] *Id.*, p. 6. [3] *Id.*, pp. 10 and 9, respectively. [4] *Id.*, p. 12.

[5] Telegram from Lord Cushendun to Mr. Chilton, Aug. 10, 1928, *id.*, 30.

[6] Telegram from British Foreign Office to Mr. Chilton, July 30, 1928, *id.*, 27.

[7] Mr. Houghton to Lord Cushendun, Sept. 28, 1928, *id.*, 34.

> The United States cannot accept as a distinct class surface combatant vessels of or below ten thousand (10,000) tons armed with guns of more than 6-inch and up to 8-inch calibre. It is further clearly apparent that limitation of this type only would add enormously to the comparative offensive power of a nation possessing a large merchant tonnage on which preparation may be made in times of peace for mounting 6-inch guns.[8]

With respect to submarine tonnage it was said that the American Government could not accept as a distinct class of submarines those of over 600 tons, leaving unlimited all submarines of 600 tons or under. The latter were declared to be formidable combatant vessels, carrying the same torpedoes as were carried by larger submarines and of equal destructive force within the radius of their operation, and capable also of being armed with guns of 5-inch calibre. In this connection it was said:

> The United States would gladly, in conjunction with all the nations of the world, abolish the submarine altogether. If, however, submarines must be continued as instruments of naval warfare, it is the belief of the American Government that they should be limited to a reasonable tonnage or number.

It was added that if there was to be further limitation on the construction of war vessels, so that competition in this regard might be stopped, it was the belief of the United States that the limitation should include all classes of combatant vessels, submarines as well as surface vessels.

Announcing its readiness to continue efforts designed to effect a real reduction and limitation of naval armaments, the American Government announced that it could not consent to the proposals which would leave the door wide open to unlimited building of certain types of ships of a highly efficient combatant value and would impose restrictions on types peculiarly suitable to American needs. Disclaiming a desire to seek special advantages on the sea, it was said that the Government of the United States could not permit itself to be placed "in a position of manifest disadvantage." It was declared, moreover, that the Anglo-French draft agreement, in leaving unlimited so large a tonnage and so many types of vessels, would actually tend to defeat the primary objective of any disarmament conference for the

[8] It was stated also that at the Three-Power Conference at Geneva in 1927, the British delegation had proposed that cruisers be thus divided into two classes: those carrying 8-inch guns, and those carrying guns of 6-inches or less in calibre; and further that 8-inch-gun cruisers be limited to a small number or to a small total tonnage limitation, and that the smaller class of cruisers carrying 6-inch guns or less should be permitted a much larger total tonnage, or, what amounted to the same thing, to a very large number of cruisers of that class. It was added that the limitation proposed by the British delegation on the smaller class of cruisers was so high that the American delegation considered it in effect on limitation at all. It was declared that the same proposal was again presented in a new and even more objectionable form in the Anglo-French understanding, which still limited large cruisers which were suitable to American needs, but frankly placed no limitation whatever on cruisers carrying guns of 6-inches or less in calibre.

reduction or the limitation of armament, in that it would not eliminate competition in naval armament and would not effect economy. For the foregoing reasons the belief was expressed that no useful purpose would be served by accepting as a basis of discussion the Anglo-French proposal.[9] It is unnecessary to dwell upon other aspects of the note through which Ambassador Houghton communicated the views of his government.[10]

The development of the Anglo-French understanding together with the response of the United States thereto emphasize the grim fact that what chiefly retards agreement among the principal maritime Powers is the conviction of individual states that proposed schemes of reduction will operate unequally and inequitably upon particular countries called upon to acquiesce. Fear of being subjected to a relative disadvantage causes a state to oppose whatever it regards as productive of such an effect. Such in brief is the reason for the conclusion of the Government of the United States in respect to the Anglo-French understanding, a conclusion that has served to render that understanding incapable of becoming the basis of general arrangement among the principal maritime Powers.

It will be recalled that what facilitated agreement on capital ships at the Washington Conference on Limitation of Armament of 1921–1922, was the skill with which the usual and common obstacle was avoided. The basis of accord proposed by the United States and accepted by the Conference was the actual and existing naval strength of the United States, Great Britain and Japan. As Secretary Hughes declared in a statement on July 1, 1924: "The solution was to take what the Powers actually had, as it was manifest that none could better its relative position unless it won in the race which it was the object of the Conference to end." In dealing with so-called auxiliary ships, and notably with submarines, the difficulty of avoiding the imposition of relative detriments is greatly enhanced, because the importance of the services which such vessels are expected to render is deemed to depend in part upon geographical and economic problems confronting particular states; and these greatly vary.

One circumstance which furnishes an elusive and persistent obstacle not oftentimes discussed is the latitude which international law yields in methods

[9] It was added that: "The American Government has no objection to any agreement between Great Britain and France which those countries think will be to their advantage and in the interest of limitation of armament, but naturally cannot consent that such an agreement should be applied to the United States."

[10] They reviewed the position taken by the United States at the Washington Conference, at the first session of the Preparatory Conference, and at the Geneva Conference. There was announced also the readiness of the Government of the United States to use its best efforts to obtain a basis of further naval limitation satisfactory to all the naval Powers, including those not represented at the Three Power Conference at Geneva, and a willingness also to take into consideration in any conference the special needs of France, Italy or any other naval Power for the particular class of vessels deemed by them most suitable for their defense.

of conducting maritime warfare. By reason of what that law permits, a submarine thus may make a special appeal to a state as an effective weapon of defense against a prospective enemy possessing a larger merchant marine, and disposed and able to arm it the moment war breaks out. It would be extremely interesting to know how France, for example, would react to the proposals of the United States and Great Britain to abolish submarines, if both of those states were ready to agree to a multilateral arrangement forbidding the arming of merchantmen. The candor and resourcefulness so justly imputed to the modern diplomat may still be insufficient to permit even friendly discussion in a large conference of the real reasons why particular states are opposed to certain restrictions or limitations. Nevertheless, the value of practices in which a belligerent is now permitted to indulge needs to be weighed again and the price exacted for them in auxiliary tonnage clearly apprehended. Technical obstacles, which at the present time loom large before the principal maritime Powers, might, however, seem less bewildering should there be political accord between certain of them on some matters where none today is known to exist.

CHARLES CHENEY HYDE.

THE MULTILATERAL TREATY FOR THE RENUNCIATION OF WAR

The Multilateral Treaty for the Renunciation of War is now before the United States Senate; and possibly before this editorial appears in print, it may have been acted upon. Several suggestions and statements by prominent officials of the government concerning the effect of the treaty have recently been published, however, which would seem to justify brief comment.

It has been said that the "interpretations" contained in the exchange of notes between the Powers, which took place prior to the signature of the treaty in Paris last August, do not constitute a part of the treaty and hence are not binding upon the signatories; and that the two substantive articles of the treaty are to be read independently of any of the governmental declarations embodied in the notes.

It seems difficult, if not impossible, to support this view. Whether the announced conditions upon which alone Great Britain and France were willing to sign this Pact are called "interpretations," "reservations," "qualifications," or what not, they express as clearly as language can express a purpose, intention, and understanding, that these countries have signed the treaty on the sole condition that their obligations under the treaty are to be interpreted and understood in the light of the declarations thus officially made and communicated. Whether such a declaration be made in advance of or concurrently with signature or by reservations on ratification would seem to make no legal difference in the construction of the Pact. These declarations were made officially to the United States as a part of the negotiation leading to the treaty and were intended to and do serve a very important purpose.

Having been accepted by the United States through Secretary Kellogg's notes, particularly the note of June 23, 1928, incorporating the complete text of the reservations or qualifications, they will, unless rejected by the Senate or the President in ratifying the Pact, constitute the binding official interpretation of the obligations, if any, incurred by the signatories of the Pact. These declarations are important; indeed so important are they, that, without them, the Pact cannot be understood.

Governments do not make such declarations or reservations as idle gestures not to be taken seriously; on the contrary, the reservations constitute the frank and honest avowal of the governments' understanding of the obligations contracted. They constitute as inherent and essential a part of the treaty obligations as if they had been written into Article I of the Pact. The declarations mentioned having been accepted by the other original signatories—the refusal of adhering Soviet Russia to accept the British declaration may be reserved—the declarations have all the elements of mutuality required in any contract. Can it be supposed that Great Britain or France, if charged at some future time with violating the Pact, would not instantly and with entire propriety invoke their official declarations duly communicated to and uncontroverted, if not indeed officially approved, by the other signatories, and assert that the wars in question were among those excepted from the renunciation—wars of "self-defense," wars under the League of Nations Covenant, under the Locarno treaties, under the French treaties of "neutrality" or alliance, or for the protection of "certain regions of the world, the welfare and integrity of which constitute a special and vital interest for (the) peace and safety" of "His Majesty's Government in Great Britain"?

In view of the fact that the treaty apparently leaves each country contemplating or exercising measures of force the judge of what is "self-defense," who could assert that any signatory, going to war under circumstances which it claims require "self-defense," is violating the Pact? Has any modern nation ever gone to war (and without any suggestion of bad faith) for any other motive? How then could this Pact ever be legally violated?

If the view were to be entertained in the United States that the declarations embodied in the exchange of notes have no relation to the treaty and that the treaty is not to be interpreted in the light of the declarations of the Powers, trouble would seem to be invited from the start, because the engagement begins by differing interpretations of the obligations incurred under it. A further serious problem may arise, particularly with respect to Soviet Russia's declaration that Soviet Russia is not to be deemed bound by the British reservations, particularly the one reserving the privilege of making war in regions of the world, the welfare and integrity of which constitute a special and vital interest for Great Britain.

If this view of the meaning of the Pact is correct, the Multilateral Treaty for the Renunciation of War will have constituted, instead of an outlawry of war, a solemn and practically universal declaration that wars of self-defense,

League wars and the others provided for in the Pact, are lawful. It is not believed that any conceivable wars have been excluded from the list of permitted wars. Heretofore, war has been regarded as a disease, neither lawful nor unlawful, but, when it occurred, to be dealt with under rules of law, because it was deemed more expedient to regulate the many relations arising out of a state of war than to permit unregulated chaos. Now the wars mentioned in the exceptions and reservations are practically recognized as privileged. It would not seem that those who demand ever larger armaments have been at all weakened in the alleged justification for their demands by anything to be found in the Pact of Paris.

In another place the writer has suggested that the expansive terms of the British claim to make war, covering as it does undefined "regions of the world" in which Great Britain has a vital interest, go far beyond anything claimed by the United States under the Monroe Doctrine, which at least has geographical limits known to everybody. Perhaps also, the Senate or a further exchange of notes may seek to make clear that it is assumed that no nation conceives that the United States intended, by the Pact, to renounce its historical claims under the Monroe Doctrine. Possibly the United States may in time voluntarily undertake, in consultation with the countries of Latin America, to modify the administration of the policy represented by the Monroe Doctrine.

The most extraordinary feature of the Pact, however, would seem to be the palpable recognition, if not the ratification, now given by the United States to the political arrangements effected in Europe by the Treaties of 1919 and the implied acknowledgment, if European publicists are to be believed, that any alteration in the *status quo* effected by force would constitute a violation of the Pact, as it will of the Covenant of the League of Nations. In theory, any forced change in the *status quo* will constitute the nation seeking to effect it an "aggressor." By the signature of the Pact the United States recognizes the legality of "League" wars and "Locarno" wars. The United States can hardly escape, therefore, being bound by League decisions as to "aggressors" and indeed League policy generally, even when directed against the United States and its interests, and this without opportunity to take part in the deliberations leading to conclusions which may be so important to the United States. European publicists and semi-official publications have been entirely honest about this construction of the obligations the United States assumes, both with respect to the League of Nations and to European political arrangements. The academic dispute about Article XVI would seem to be settled according to European desires. The United States is practically bound to concede the validity of any European measures against the League-declared pariah. Whether the United States is bound actively to *support* League conclusions as to "aggressor" nations and other conclusions may be debatable; but at the very best, the Pact places the United States in the uncomfortable position of being bound by decisions in the

making of which it had no part or of having recriminations leveled against it for refusing to support its own treaty.

The recognition of the French and British reservations, openly and honestly advanced, is a commitment for the United States, not for Europe. While leaving European countries with a free hand, the United States is obligated to recognize, if not indeed to support, decisions of a political body of which the United States is not a member. Should the United States in time of crisis repudiate the commitments which the treaty in its official construction embodies, the United States, it would seem, can hardly avert widespread denunciation.

As thus understood, therefore, the Pact of Paris is not a renunciation of war, but a formal recognition of the legality of all wars mentioned in the reservations and exceptions. It is a recognition of the British claim to make war wherever British interests require it. It is a commitment to the League of Nations and its conclusions without a vote. At least, it may be suggested, the United States might endeavor to save what it can from an unhappy situation by stating officially, whether by reservation or otherwise, that the United States is not to be deemed bound by any conclusions of the League of Nations or particularly by any measures of enforcement undertaken.

The note of the United States to the other Powers of June 23, 1928, states that a "violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state." But that seems quite insufficient, for it would appear far more likely that two or more Powers may, in entire good faith, enter upon a war of "self-defense," as they judge it, in which event they will not have violated the multilateral treaty. Even in that event, however, the United States should be released from any obligation which may be imputed to it under the treaty. Moreover, the Four-Power and the Nine-Power Treaties governing the Pacific and Asiatic areas are probably not to be deemed abandoned by virtue of this Pact.

In his note of February 27, 1928, the Secretary of State of the United States deplored any "exceptions and qualifications stipulating when nations would be justified in going to war," adding that the treaty's "effect would be very greatly weakened and its positive value as a guaranty of peace, virtually destroyed." He added:

> I cannot avoid the feeling that, if governments should publicly acknowledge that they can only deal with this ideal in a technical spirit and must insist upon the adoption of reservations impairing, if not utterly destroying, the true significance of their common endeavors, they would be, in effect, only recording their impotence, to the keen disappointment of mankind in general.

The reader may determine whether the reservations thus deplored have not, in effect, found their way into the treaty. Perhaps in the interests of clarity, the European nations are to be commended for not professing to re-

nounce what they really had no intention of renouncing. But by the same token, it is questionable whether any national policy has been renounced by this treaty and whether the cause of peace has made any advance. On the contrary, it could, with some justification, be said that new causes of misunderstanding have been added to the existing burdens of the world, without any manifest evidence of compensatory gain to the cause of peace. That cause will have to be served by more serious efforts to reach the more fundamental factors of economic and political rivalry and unfair competition, toward which but little has yet been done. But that is another story.

EDWIN M. BORCHARD.

GREAT BRITAIN, FRANCE AND ITALY SETTLE THE NANKING INCIDENT WITH CHINA

The settlement of the Nanking incident of March 24, 1927, as between the United States and China was the subject of editorial comment in the July, 1928, issue of this JOURNAL.[1] It will be recalled that the American settlement was effected by three exchanges of notes dated April 3, 1928. The first of these exchanges settled the Nanking incident proper substantially on the basis of the original terms presented by the foreign Powers under date of April 11, 1927, namely, adequate punishment of the guilty, a suitable apology, and "compensation in full." The second exchange dealt with the protective barrage thrown around Socony Hill by the American and British war vessels, and the third with the general question of treaty revision. As pointed out in this JOURNAL,[2] there was a disposition at the time the American settlement was announced, on the part of some of the Japanese and British controlled treaty-port newspapers (especially before the terms of the American settlement were known in full), to criticize the action of the United States. In particular it was predicted that the Sino-American Joint Commission which was to be set up under the terms of the settlement for the assessment of damages would be unduly delayed and would be generally ineffective in securing redress for the sufferers.[3]

Happily these pessimistic forebodings have been refuted by the progress of events. The United States and China have proceeded in regular course to the constitution of the Joint Commission by the appointment of two members from each country with provision for an umpire in case of need. Joint instructions were given by the two Governments for the guidance of the commission, which has gone regularly about its business of the adjudication of claims. Last, but not least, the Department of State was early able to announce that an initial deposit by China of $100,000 silver, on account of the Nanking reparations, was promptly made.[4]

[1] See editorial, this JOURNAL, July, 1928, Vol. 22, p. 593 *et seq.*

[2] *Ibid.*, pp. 597–599. [3] See the *Peking Standard*, (Japanese controlled), April 4, 1928.

[4] See *United States Daily*, May 5, 1928.

Great Britain, France and Italy have since followed the lead of the United States and each of them has settled the Nanking incident so far as its own claims are concerned upon the same terms, as far as applicable, as those agreed upon by the United States and China, the exchanges of notes embodying the settlements being couched in practically the same language as that employed in the American settlement.

Great Britain's relation to the Nanking incident most closely paralleled that of the United States, the British war vessel *Emerald* having joined the American war vessel *Noa* and *Preston* in throwing a protective barrage around Socony Hill, thereby saving the British and American citizens there congregated from imminent danger of death and making possible the evacuation of the foreign colony at Nanking. The Sino-British notes of settlement, bearing date of August 9, 1928, are accordingly in all essential points identical *mutatis mutandis* even in the matter of phraseology with the Chinese-American notes.[5] The French settlement was effected by similar diplomatic exchanges on October 1 and 9, 1928, relating, respectively, to the Nanking incident proper and the question of treaty revision. No French naval vessel having taken part in laying the protective barrage, there was no French exchange on that topic.[6] In like manner the Italian settlement was effected through two exchanges of notes similar to the French and of about the same date.[6]

The arrangements which have been arrived at between the United States and China as respects the constitution and functioning of the Sino-American Joint Commission for the assessment of damages will doubtless greatly facilitate and expedite the setting up of similar commissions for the settlement of the British, French and Italian claims.

American diplomacy in the Orient has once more led the way to a practical solution of a difficult and delicate problem, to the advantage not only of American interests but to the general advantage of China and the Western Powers.

WILLIAM C. DENNIS.

PRESENT INTEREST IN FOREIGN AFFAIRS AND THE STATE DEPARTMENT'S PUBLICATION FACILITIES

The present interest among the people of the United States in foreign affairs is believed to be considerably more widespread than is generally realized, even by those who may be more or less familiar with different phases of the general subject. Since the World War, there has been a large increase in the teaching of international subjects in American educational institutions, and courses in international law and less technical topics relating to foreign

[5] See British Command Papers, China, No. 1, 1928. Papers relating to the Nanking incident of March 24, 1927.

[6] For text of these notes see, *North China Herald*, Oct. 20, 1928.

affairs have been added to, or expanded in, the curricula of the colleges and universities of the United States. In the academic year 1927–1928, there were 358 institutions of higher learning in the United States teaching international law and related subjects, as against 225 teaching the same subjects during the academic year 1920–1921, or an increase of 60 per cent during the preceding seven-year period. In 1927–1928, there were 575 faculty members teaching international law and related subjects. The courses in public international law totalled 248, with an aggregate attendance of 8,508 students, or an average of 34 students per institution offering the subject. The number of students taking related subjects, such as private international law, arbitration, diplomacy, and international organization, is not available, but since there are more courses and more teachers of these related subjects than of public international law, it seems safe to assume that the number of students taking the related subjects is considerably in excess of those taking the technical courses in public international law.

This interest in foreign affairs among the students has increased to such an extent that international relations clubs have been formed in many American colleges and universities to promote a better understanding of and acquaintance with the foreign policies and problems of the Government of the United States. There are now 138 clubs of this character in existence, 22 having been organized during the preceding year. They have formed a central organization and have held two annual meetings.

Besides the academic interest in the study of foreign affairs, there has developed during the same period a corresponding interest among leaders of opinion and practical men of affairs, which has manifested itself in the organization of institutes of politics and of international relations, distributed geographically over the United States. The first of these organizations was the Institute of Politics at Williamstown, Massachusetts, organized in 1921 "for the purpose of impartially exploring the facts underlying international events and promoting among adults the serious study of foreign affairs with a view of creating a more sympathetic understanding of the problems and policies of our own and other nations." The Institute has held well attended meetings every year since its organization.

The Institute of International Relations attempts to do for the Pacific Coast what the Williamstown Institute does for New England. It held its inaugural session at Riverside, California, in December, 1926, with an attendance made up of 100 representative citizens, representatives from eleven educational institutions, and 33 representatives from clubs and organizations. A second session was held at the University of Washington in Seattle in July, 1928, with a membership of nearly 400.

The Institute of Pacific Relations was organized by a group of business and professional men in Hawaii for the purpose of improving the relations between the peoples of the Pacific area. It has held two international conferences at Honolulu, the first, in July, 1925, and the second, in July, 1927.

A total of 137 members attended the second conference, representing practically all the nations bordering on the Pacific Ocean. The proceedings of this conference occupy a large printed volume of some 600 pages.

In February, 1927, the Louisiana State University held at Baton Rouge, Louisiana, the first of a series of annual conferences on foreign affairs and American diplomacy, to which were invited all college, university and high school teachers of the southwest, as well as club women, editors, business men, preachers and interested citizens. The aim of the conference was to provide its members with "a survey of the problems of international relations and the part of the United States in them," and its purpose "to bring to the university outstanding leaders in the fields of discussion and to hear what they have to say of the relation of the United States to world politics." The announcement continued: "If the American people can get the facts of their country's present-day influence, they can make up their own minds what they want their foreign policy to be."

In July, 1928, there was held at the University of Georgia, in Athens, Georgia, an Institute of Public Affairs and International Relations, which was addressed by experts of national and international reputation. The round table conferences, open forums, and lectures of this meeting continued from July 9 to July 24.

From August 5 to 18, 1928, the University of Virginia held a second session of its Institute of Public Affairs, designed to advance the popular understanding of current public questions. While this Institute emphasizes particularly domestic problems of the United States, international subjects are given a place upon its program. The Latin American relations of the United States received consideration at this recent meeting. Invitations to this Institute are extended to recognized scholars and research workers, and to outstanding men and women in practical politics and public service.

A number of other outstanding instances of the efforts now being made to meet the requirements of the men and women of the United States for information on foreign affairs could be cited, but the foregoing will be sufficient to demonstrate the character and extent of the interest that is now being taken in this subject, which, before the World War, received comparatively slight consideration.

In addition to the interest in foreign affairs above shown in the educational institutions and in special organizations devoted to the subject, the political scientist is widening his interest to embrace international subjects. The Academy of Political Science in the City of New York devoted its entire session in July, 1926, to international problems and relations, and the American Academy of Political and Social Science has devoted its last several annual sessions in Philadelphia to international questions.

All of these various activities promoting interest in foreign affairs, in the academic institutions, in the specially organized business and professional

organizations, and in the political science academies, produce a constant and ever-increasing demand for prompt and authentic information in regard to the conduct of American foreign relations in all parts of the world. A number of private organizations are now attempting to meet this demand by providing information from secondary sources. There is only one place, however, where first-hand information may be had in authentic form, and that is in the State Department at Washington. The inability of that Department to furnish information promptly and to the extent desired often creates a feeling of resentment on the part of the disappointed applicant who may unthinkingly attribute his failure to receive the information to an unsympathetic attitude on the part of the Department.

International lawyers, teachers, research workers, and other interested persons, are beginning to realize, however, that the Department of State has not been provided with the proper personnel and with the proper printing funds for editing and publishing information in regard to its work as have the departments of the Government dealing with domestic affairs. Illustrations of some of the subjects under consideration by the Department of State upon which the public might have been more adequately and promptly informed may be taken from some of the more important subjects of the press releases recently issued by the Department, to wit, the official report on American activities in Haiti, negotiations with Great Britain in regard to the suppression of liquor smuggling and with Canada in regard to the St. Lawrence waterway and the Chicago drainage canal; the American attitude in regard to the opium traffic; the arrangements with Nicaragua for the supervision of elections in that country; the part of the United States in the renewal of diplomatic relations between Chile and Peru; the negotiations with Mexico in regard to the petroleum question; up-to-date information in regard to the status of arbitration and conciliation treaties between the United States and other countries; the situation in China and the attitude of the United States on important questions outstanding between China and the great Powers; and the various conferences held at Geneva in the last few years on the subject of disarmament and economic questions in which the United States has participated. The press releases on these subjects issued by the Department are of a fugitive character in mimeographed form. They are largely restricted to the press, which uses its own judgment as to what part, if any, of them shall be printed. They are usually destroyed as soon as the immediate purposes of publication are served. The person who is interested in these documents as permanent records has no place to find them for study or reference. The general approval which the action of the Department received for its prompt publication in printed form of the negotiations leading to the conclusion of the Pact of Paris for the renunciation of war, together with the text of the treaty, shows how the public and the press will respond to publications of the character herein advocated. The serial publication of like documents on other subjects of international interest by the

Department of State would provide a definite source of information upon which the interested public could rely.

There can be no question that it is desirable that the American people should take an intelligent interest in the foreign relations of their Government. The educational movement herein outlined promises, if it continues and develops, to go a long way in achieving that desirable result. The best way to encourage it is for the Government itself to make proper provision so that interested persons may get reliable information from the public servants whose duty it is to supply it. It is therefore gratifying to be able to state that the committee appointed by the American Society of International Law at its last meeting has made commendable progress in urging official and legislative action to enlarge the scope of the publications of the Department of State.

The Chairman of the committee, Mr. William C. Dennis, arranged a hearing before General Herbert M. Lord, Director of the Bureau of the Budget, on an item of $77,000 which had been included in the State Department's supplemental estimates to take care of the three most urgent items in the program of publications, namely, the serial publication of important press releases and other documents, bringing *Foreign Relations* up to date on a four-year schedule, and publishing a scholarly edition of the treaties of the United States. The hearing took place on October 4, 1928, and in addition to Mr. Dennis, the following representatives spoke: on behalf of the American Society of International Law, Dr. James Brown Scott, Mr. Frederic D. McKenney, Mr. Lester H. Woolsey, and the undersigned; on behalf of the Conference of Teachers of International Law, Professors Charles E. Hill, Kenneth Colegrove, and Daniel C. Stanwood. Communications of approval were presented from Messrs. Charles E. Hughes, Robert Lansing, and Charles Henry Butler, and Professors Manley O. Hudson, Edwin M. Borchard, and Quincy Wright. Mr. Dennis put into the record the proceedings upon the subject at the last meeting of the American Society of International Law and at the Conference of Teachers of International Law, as well as the two editorials which appeared in this JOURNAL for July, 1928, pages 624 and 629. Assistant Secretary of State Wilbur J. Carr attended the hearing and took a most helpful part. Although the Committee had been allotted but an hour and a half to present its arguments, General Lord became so interested in what it had to say that he granted an additional two hours in the afternoon of the same day. Notwithstanding the fact that the Bureau of the Budget was then engaged in revising downward the departmental estimates to avoid the possibility of a deficit at the end of the next fiscal year, the Bureau later approved items amounting to $50,000 out of the $77,000 requested in the Department's supplemental estimates. The approved items consist of $40,000 for additional personnel in the Division of Publications of the Department and $10,000 for additional printing.

Hearings on the Budget estimates for the Department of State were held

before a subcommittee of the House Committee on Appropriations on November 20–22, 1928. Secretary of State Kellogg, Assistant Secretary of State Carr, and Mr. Tyler Dennett, Chief of the Division of Publications, spoke on behalf of the Department in favor of the proposed appropriation, and Mr. William C. Dennis and Professor Charles E. Hill appeared on behalf of the committees of the Society and the International Law Teachers. Mr. Dennis put into the record the statements and documents previously presented to the Bureau of the Budget. The result of this hearing was equally as gratifying as the hearing before General Lord, for the State Department Appropriation Bill for the fiscal year 1930, carrying the items making up the $50,000 increase for the publications of the Department of State, was reported favorably by the Appropriations Committee and passed the House of Representatives without opposition on December 20, 1928.* The appropriation is therefore now pending in the Senate, and should that body act favorably upon it, the Department of State will be in a position to initiate its new program of publications on July 1, 1929.

GEORGE A. FINCH.

RECOGNITION AND MULTIPARTITE TREATIES

In the popular discussion of the General Pact for the Renunciation of War, the question has been raised whether ratification by the United States would involve its recognition of the Government of the Union of Socialist Soviet Republics.[1] The treaty signed at Paris on August 27, 1928, provides (Article 3):[2]

> The present treaty shall be ratified by the high contracting parties named in the preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.
>
> This treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.
>
> It shall be the duty of the Government of the United States to furnish each government named in the preamble and every government subsequently adhering to this treaty with a certified copy of the treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such governments immediately upon the deposit with it of each instrument of ratification or adherence.

* *Congressional Record*, Vol. 70, No. 16, pages 965–984.

[1] See the New York Times, Nov. 20, 1928, p. 5; The Nation (New York), Nov. 21, 1928, p. 543.

[2] Text as published by the Department of State.

It seems to have been agreed at Paris that the Union of Socialist Soviet Republics should be invited to adhere to the treaty, the invitation to be sent by the Government of the French Republic through the French Ambassador at Moscow; and such an invitation was tendered on August 27, 1928. On August 31, 1928, M. Litvinoff, the Acting Commissar of the People for Foreign Affairs, replied that his government intended to accept the invitation, and asked the French Ambassador to communicate his statement to the French Government "with the request that it will kindly transmit it to the Government of the United States of North America." On September 6, 1928, M. Litvinoff signed a declaration "that the Union of Socialist Soviet Republics adheres to the treaty," and this declaration was sent to the French Foreign Office which transmitted it to the United States Department of State through the French Embassy at Washington.[3]

The Government of the United States has not recognized the Government of the Union of Socialist Soviet Republics. This does not mean that in the view of the Government of the United States, the Government of the Union of Socialist Soviet Republics does not exist.[4] That fact cannot be denied, and international law does not compel governments to be blind to facts. Nor does it mean, necessarily, that the two governments can have no relations with each other. It means, rather, that their relations are not those which members of the international community ordinarily have, and are not conducted according to established usages and the general principles of international law. It is doubtless true that "recognition is largely a matter of intent on the part of the nation according recognition."[5] Extended dealings between two governments, therefore, may not create a situation in which they should be said to have recognized each other;[6] but the maintenance of regularly established diplomatic relations must involve such recognition as will entitle each government to insist on the application of international law.

The agreement of the United States that an invitation should be extended to the Union of Socialist Soviet Republics, the receipt by the Department of

[3] See press releases of the Department of State, of Oct. 4, 1928.

[4] "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War." Cardozo, J., in Sokoloff *v.* National City Bank (1924), 239 N. Y. 158.

[5] This statement is attributed to Secretary Kellogg. New York Times, Sept. 28, 1928, p. 10.

[6] In the *Annette*, [1919] Probate, 105, it was thought that Great Britain had not recognized the Provisional Government of Northern Russia, though that government had a representative in London and a British commissioner had been sent to Archangel. The United States maintained a *chargé d'affaires* at Mexico during a period in which no government of Mexico was recognized. See, especially, United States on behalf of George W. Hopkins *v.* United Mexican States, Opinions of the Commissioners, Claims Commission of the United States and Mexico, p. 42.

State of the declaration of adhesion made by the Union of Socialist Soviet Republics, and the communication of this declaration to other governments by the Government of the United States in accordance with the provision in the third paragraph of Article 3 of the treaty of August 27, 1928, may constitute an admission of the fact that the Government of the Union of Socialist Soviet Republics exists for the purposes of receiving the invitation and of making the declaration to which Article 3 refers. But it seems hardly possible to conclude that such acts set into play any magic which involves an imposed recognition by the United States for other purposes.[7]

A somewhat different question arises with reference to the assumption of treaty obligations by two governments *inter se*. Mr. Arnold D. McNair lists among the "commonest modes" of recognition, "the mere fact of the conclusion of a treaty between the recognizing state and the recognized state," "the mere fact of the conclusion of a collective treaty between a group of recognizing states and the recognized state," and "admission to an international congress or conference."[8] The first of these statements may be subject to misapplication. Something should depend on the nature of the treaty. Certainly, the conclusion of a bipartite treaty of amity providing for the establishment of regular diplomatic relations, would be taken to constitute a general recognition. Even the *signing* of the tariff treaty on behalf of the Government of the United States and the Nationalist Government of the Republic of China, on July 25, 1928, has been taken to have involved the former government's recognition of the latter government,[9] though the treaty has not yet been ratified. But it would be going too far to say that two governments might not regulate urgent matters by treaty without the consequence of a recognition which at least one of them did not desire. Governments situated as were those of Colombia and Panama some years ago might, for instance, enter into an agreement concerning the stationing of border patrols, and it seems improbable that an international tribunal would say that recognition followed necessarily, though the agreement should be in the form of a treaty.

Nor should the conclusion of a multipartite instrument require us to say that each of the signatory governments recognizes each of the others for all purposes. When Colombia decided to accede to the Covenant of the League of Nations, the Colombian Government desired to do so without thereby committing itself to a recognition of the independence of Panama. The Treaty of Versailles had been signed on behalf of Panama, and was later

[7] See, however, Maurice Fontaine, "Have We Recognized Soviet Russia?", The Nation (Nov. 21, 1928), p. 543.

[8] In 1 Oppenheim, International Law (4th ed., 1928), p. 145 note. See also 1 Hyde, International Law, § 37; Hershey, Essentials of International Public Law and Organization, p. 200.

[9] This was reported to be the view held in the Department of State. New York Times, Sept. 28, 1928, p. 10. For the text of the Treaty with China, see the Department of State press release of July 27, 1928, and supplement to this JOURNAL, Oct. 1928 (Vol. 22), p. 170.

ratified by Panama. It would seem that the legal effect of Colombia's accession must have been her recognition of Panama as a member of the League of Nations, but not otherwise;[10] and the two governments did not establish diplomatic relations until 1924.

The drafting of a multipartite instrument is usually the work of an international conference; but the mere fact of the representation of a government at an international conference does not mean that it is recognized by every other government which participates. "Delegates to an international conference will often be accepted from such [an unrecognized] government."[11] Something may depend on the nature and purpose of the conference. One of the objects of the Genoa conference of 1922 was to find a way of dealing with the government in Russia which was not yet recognized by all of the governments represented. The Government of the Union of Socialist Soviet Republics was represented at the European Conference on the Measurement of Vessels Employed in Inland Navigation at Paris in 1925, with various other governments by some of which it has not been recognized; and its representative signed the convention of November 27, 1925, which emanated from the conference.[12] Yet such other governments did not feel it necessary to make any reservation on the question of recognition. Certainly, the mere participation of representatives of the United States and of the Union of Socialist Soviet Republics at the Economic Conference in Geneva in 1927, at the meeting of the League of Nations Preparatory Commission of the Disarmament Conference, in March, 1928, and at the General Meeting of Government Experts on Double Taxation and Tax Evasion, in October, 1928, did not involve the recognition of the Government of the Union of Socialist Soviet Republics by the United States. The question has frequently arisen at meetings of the International Conference of American States,[13] and the usefulness of those conferences might have been greatly impaired if it had been thought that common participation involved recognition by each government of all others which participated. At the Fourth International Conference of American States at Buenos Aires in 1910, both Colombia and Panama were represented, and the representatives of both signed the Convention on Inventions, Patents, Designs and Industrial Models of August 20, 1910; the Convention on Protection of Trade Marks of August 20, 1910; the Convention on Literary and Artistic Copyright of

[10] See Manley O. Hudson, "Membership in the League of Nations," this JOURNAL, Vol. 18, pp. 436, 439.

[11] U. S. on behalf of Hopkins *v.* United Mexican States, cited *ante*, note 6.

[12] See League of Nations Document, C. L. 136. 1926 VIII Annex.

[13] In the discussions of the reorganization of the Pan American Union at the Fifth International Conference of American States at Santiago, special attention was given to the participation in the maintenance of the Pan American Union of states which "might have severed diplomatic relations with any other country of the American Continent." See Acts of the Conference, p. 485. See also Report of the Delegates of the United States of America to the Fifth International Conference of American States, p. 5.

August 11, 1910, and the Convention on Pecuniary Claims of August 11, 1910.[14] Yet the treaty between the United States and Colombia by which Colombia agreed to recognize Panama as an independent nation, was not signed until April 6, 1914.[15]

When the Universal Postal Convention was revised by the congress at Stockholm in 1924, both the United States of America and the Union of Socialist Soviet Republics were represented, and the representatives of both signed the convention of August 28, 1924,[16] which the United States ratified. Both "countries" were classified in the first class in Article 85 of the regulations for the execution of the convention, for the purpose of "distributing the expenses" of the International Bureau; and in a final protocol annexed to the regulations, signed on behalf of both governments, it was provided:[17]

> It is permissible for the Union of the Socialistic Soviet Republics to cause to be taken, in October–November for the year 1925, a set of special statistics for the correspondence in transit over the Trans-Siberian Railway. These statistics shall serve as the basis for the transit charge accounts during the period from 1924 to 1928.

Here, then, is a multipartite treaty—not less so because it deals with postal communications, nor because it was ratified by the Postmaster General of the United States with the approval of the President, and without the special advice and consent of the Senate;[18] and both the United States of America and the Union of Socialist Soviet Republics are signatories. For the purposes served by the treaty, but not for other purposes, the United States may be said to have recognized the Union of Socialist Soviet Republics by becoming a party to the convention.

In 1926, both the United States and the Union of Socialist Soviet Republics were represented at the conference in Paris which drew the International Sanitary Convention of June 21, 1926, revising the International Sanitary Convention of January 17, 1912. The convention was signed on behalf of both governments, but the plenipotentiaries of the United States signed subject to the following declaration entered in the protocol of signature:

> The plenipotentiaries of the United States of America formally declare that their signing the International Sanitary Convention of this date is not to be construed to mean that the United States of America recognizes a régime or entity acting as government of a signatory or adhering

[14] See Senate Document, No. 744, 61st Cong., 3rd Sess.

[15] See also the Foreign Policy Association Information Service, Vol. 4, No. 18 (Nov. 9, 1928), p. 374, concerning the signature of the Lausanne Convention of July 24, 1923, relating to freedom of transit and navigation of the Straits.

[16] 44 U. S. Statutes, p. 2221. In Russian Re-Insurance Co. *v.* Stoddard, (1925) 211 App. Div. 132, (1925) 240 N. Y. 149, one of the findings of the trial court was that "the United States has concluded no treaties with Russia as represented by the Russian Socialist Federated Soviet Republic." The judgment of the trial court had been entered on Oct. 9, 1924, several weeks after the signing of the convention at Stockholm.

[17] 44 U. S. Statutes, p. 2348.

[18] Altman & Co. *v.* U. S., (1912) 224 U. S. 583.

> Power when that régime or entity is not recognized by the United States as the government of that Power. They further declare that the participation of the United States of America in the International Sanitary Convention of this date does not involve any contractual obligation on the part of the United States to a signatory or adhering Power represented by a régime or entity which the United States does not recognize as representing the government of that Power until it is represented by a government recognized by the United States.

On March 22, 1928, the Senate of the United States gave its consent to the ratification of the convention, subject to certain understandings and conditions, including the following:[19]

> 1. The ratification of this international sanitary convention is not to be construed to mean that the United States of America recognizes a régime or entity acting as government of a signatory or adhering Power when that régime or entity is not recognized by the United States as the government of that Power.
>
> 2. The participation of the United States of America in this international sanitary convention does not involve any contractual obligation on the part of the United States to a signatory or adhering Power represented by a régime or entity which the United States does not recognize as representing the government of that Power until it is represented by a government recognized by the United States.

On April 7, 1928, the convention was ratified by the President, with the understandings and conditions subject to which the Senate's consent was given;[20] and no record of any objection by other Powers is available. Assuming the absence of such objection, the American plenipotentiaries' declarations and the Senate's understandings and conditions would seem to have enabled the United States to become a party to the convention without becoming bound in any way *vis-à-vis* the Union of Socialist Soviet Republics. The precedent of the action taken with regard to the Universal Postal Convention of 1924 might have inspired a different course for the representatives of the United States at the Paris conference in 1926, and it is not to be concluded that the action with reference to the International Sanitary Convention constitutes any necessary precedent for future multipartite instruments.[21]

Assuming that the Union of Socialist Soviet Republics' declaration of adherence will be effective under the provision in the Paris Treaty of August 27, 1928, that "this treaty shall, when it has come into effect . . . remain open as long as may be necessary for adherence by all the other Powers of the

[19] 69 Congressional Record (March 22, 1928), p. 5380.

[20] See U. S. Treaty Series, No. 762. The ratification was deposited at Paris on May 22, 1928.

[21] Reference may also be made to the treaty concerning the Archipelago of Spitzbergen, of February 9, 1920, which provides for adherence by "third powers." See 2 League of Nations Treaty Series, p. 7. This treaty was ratified by the United States, and the ratification was deposited at Paris on April 2, 1924. See 39 *Id.*, p. 165; and Supplement to this JOURNAL, Vol. 18 (1924), p. 199.

August 11, 1910, and the Convention on Pecuniary Claims of August 11, 1910.[14] Yet the treaty between the United States and Colombia by which Colombia agreed to recognize Panama as an independent nation, was not signed until April 6, 1914.[15]

When the Universal Postal Convention was revised by the congress at Stockholm in 1924, both the United States of America and the Union of Socialist Soviet Republics were represented, and the representatives of both signed the convention of August 28, 1924,[16] which the United States ratified. Both "countries" were classified in the first class in Article 85 of the regulations for the execution of the convention, for the purpose of "distributing the expenses" of the International Bureau; and in a final protocol annexed to the regulations, signed on behalf of both governments, it was provided:[17]

> It is permissible for the Union of the Socialistic Soviet Republics to cause to be taken, in October–November for the year 1925, a set of special statistics for the correspondence in transit over the Trans-Siberian Railway. These statistics shall serve as the basis for the transit charge accounts during the period from 1924 to 1928.

Here, then, is a multipartite treaty—not less so because it deals with postal communications, nor because it was ratified by the Postmaster General of the United States with the approval of the President, and without the special advice and consent of the Senate;[18] and both the United States of America and the Union of Socialist Soviet Republics are signatories. For the purposes served by the treaty, but not for other purposes, the United States may be said to have recognized the Union of Socialist Soviet Republics by becoming a party to the convention.

In 1926, both the United States and the Union of Socialist Soviet Republics were represented at the conference in Paris which drew the International Sanitary Convention of June 21, 1926, revising the International Sanitary Convention of January 17, 1912. The convention was signed on behalf of both governments, but the plenipotentiaries of the United States signed subject to the following declaration entered in the protocol of signature:

> The plenipotentiaries of the United States of America formally declare that their signing the International Sanitary Convention of this date is not to be construed to mean that the United States of America recognizes a régime or entity acting as government of a signatory or adhering

[14] See Senate Document, No. 744, 61st Cong., 3rd Sess.

[15] See also the Foreign Policy Association Information Service, Vol. 4, No. 18 (Nov. 9, 1928), p. 374, concerning the signature of the Lausanne Convention of July 24, 1923, relating to freedom of transit and navigation of the Straits.

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world,"[22] will the ratification of the treaty by the United States have any effect on our relations with the Union of Socialist Soviet Republics? Conceivably, a different situation could be said to exist if the adherence by the Union of Socialist Soviet Republics had followed the ratification by the United States. It may be doubted whether the parties to the Paris Treaty assume any legal obligation *inter se* under its first article.[23] They join in a condemnation of recourse to war for the solution of international controversies and in a renunciation of war as an instrument of national policy in their relations with each other, thus making a joint declaration of common policy. Surely the United States and the Union of Socialist Soviet Republics may participate in a common condemnation and renunciation of this sort without entering into any regular diplomatic relations. By the second article of the Paris Treaty, the parties agree that the settlement or solution of disputes or conflicts among them shall never be sought except by pacific means; they do not undertake to seek solution by pacific means, but only to refrain from seeking solution otherwise. If this is a legal obligation owed by each signatory or adhering state to each other signatory or adhering state, there would seem to be no reason why this obligation cannot be assumed by the United States and the Union of Socialist Soviet Republics *inter se*, without implication of any further relations. The most that may be said is that the Government of the United States would thereby recognize the Government of the Union of Socialist Soviet Republics for this one purpose. Recognition for other purposes need not follow, and is not to be predicated on any necessary implication which is involved.

Several states the governments of which have not recognized the Government of the Union of Socialist Soviet Republics have expressed their intention to adhere to the Paris Treaty, and so far as the announcements by the Department of State go, none of them has felt it necessary to make a reservation concerning such recognition. It is gratifying, therefore, that when the Paris Treaty of August 27, 1928, was ratified by the United States on January 17, 1929, the action taken with reference to the International Sanitary Convention was not followed as a precedent, and that no reservation or condition or understanding was thought to be necessary because of the nonrecognition of the Government of the Union of Socialist Soviet Republics.

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[22] Since the treaty will not come into force until the ratifications of all the signatories are deposited at Washington, the provision for adherence by non-signatory states is not effective prior to that time, and hence no instrument of adherence can be affective as such, under the provision, until after the treaty comes into force. Yet the declaration signed by M. Litvinoff on September 6, 1928, is in form definitive, and nothing remains to be done by the Union of Soviet Socialist Republics. It might have been a possible construction that the treaty was open to adherence only by those Powers which all the signatories shall have recognized as such; but this possibility has been foreclosed by events.

[23] See David Hunter Miller, The Peace Pact of Paris, c. 18; James T. Shotwell, War as an Instrument of Policy, c. 20.

THE WORK OF THE NINTH ASSEMBLY OF THE LEAGUE OF NATIONS

The ninth session of the Assembly and the fifty-first and fifty-second sessions of the Council of the League of Nations took place in September. Fifty of the fifty-four member states, including Spain, were represented by delegates, among them being six prime ministers and sixteen ministers of foreign affairs. The non-permanent membership in the Council of China, Colombia and the Netherlands having expired, Spain, Persia and Venezuela were elected to the places vacated. The Chinese delegation made a vigorous appeal for the reëlection of China, but on account of the strong sentiment against departing from the rule against reëligibility and the feeling that Persia had a stronger claim, the appeal of China was rejected. By way of exception, however, Spain was declared reëligible in pursuance of a rule adopted in 1926 relative to the election of non-permanent members.

The work of the Assembly consisted, in the main, of general debate on such subjects as the work of the Special Committee on Arbitration and Security, the Kellogg Pact, disarmament, the economic work of the League, and the protection of minorities. The reports of the various technical organizations of the League were also reviewed and discussed. Mr. John Bassett Moore having resigned his position as judge of the Permanent Court of International Justice, the Council and Assembly elected Hon. Charles E. Hughes as his successor.

In connection with the organization and procedure of the Permanent Court there was some discussion of two proposals: one relating to the amendment of the Court Statute and the other to the majority required of the Council or Assembly in requesting advisory opinions of the court. The first proposal was put forward by the French delegation, which called attention to the increasing number of cases now being brought before the court and to the fact that the statute of the court had not been altered since it went into effect in 1920. The time had arrived, in the opinion of the French delegation, for consideration of the question whether certain articles of the statute were not in need of modification, and if changes were found desirable they should be made before the reëlection of the judges or the election of their successors in 1930. It accordingly proposed a resolution, which was adopted by the Assembly, calling the attention of the Council to the advisability of examining the statute with a view to proposing to the Assembly at its next session such amendments as it judged to be desirable.

The second proposal was made by the Swiss delegation in the form of an Assembly recommendation to the Council that the latter body consider whether it was not desirable to submit to the Permanent Court for advisory opinion the question whether a request for an advisory opinion by the court required a simple majority vote of the Council or Assembly, or whether a unanimous vote was necessary. This question, which is still an open one was, it will be recalled, a subject of much discussion at the time of the debate in the United States Senate on the proposed reservations to the resolution of

adherence by the United States to the court protocol. The controversy as to the extent of the vote required turns on the question whether a request for an advisory opinion is a matter of procedure or of substance. In the former case, a majority is sufficient; in the latter, unanimity is required. As to which of these views is correct there is a difference of opinion, and the purpose of the Assembly resolution is to obtain the opinion of the Permanent Court on the question. The decision, of course, will not be binding upon either the Assembly or the Council. In case it is not acceptable the only solution will be an interpretative amendment of Article 14 of the Covenant.

In this connection reference may be made to a proposal put forward by the Lithuanian delegation requesting the Council to initiate an inquiry as to whether certain amendments to the Covenant were not desirable to bring it into harmony with the Kellogg Pact. It was pointed out by the authors of the resolution that the Kellogg Pact goes considerably beyond the Covenant in the extent of the obligations which it creates in respect to the renunciation of war, and it was argued that the Covenant should therefore be amended so as to establish a correspondence between the obligations of the two instruments. Owing to the fact, however, that the Kellogg Pact was at the time only a *projet* not having been generally ratified, it was felt to be premature to take steps looking toward alteration of the Covenant along these lines before the Pact had gone into effect. The Lithuanian proposal was not therefore adopted by the Assembly. As indicated above, the Kellogg Pact was the subject of frequent mention in the Assembly debates, nearly all the speakers referring to it in terms of high praise. M. Politis, in particular, characterized it as an act which filled up important gaps in the Covenant and greatly strengthened the League. It was, he affirmed, the result and complement of the work of the Assembly itself, which on three different occasions during the past five years had proclaimed as a principle of international law that wars of aggression should be regarded as a crime. In signing the Pact, states had, he added, for the first time in the history of humanity, agreed to renounce war and the resort to force as means of advancing their national interests. This was more than a great innovation in international law; it was a real revolution for the achievement of which the Assembly had a reason to congratulate itself.

In respect to the codification of international law, the Assembly expressed its high appreciation of the work already accomplished by the Preparatory Conference, called attention to the importance and urgency of codifying international law as a means of facilitating the settlement of disputes by arbitration and judicial process, and expressed its desire that the Conference on Codification should be convened during the year 1929. On account of the inclusion of the subject of nationality on the agenda of the conference—a subject of special interest to women—it expressed the hope that members of the League taking part in the conference would consider the advisability of including women in their delegations. It voted to reserve for a future con-

ference two questions which the Committee of Experts considered ripe for international regulation, namely, the legal position and functions of consuls and the competence of the courts in regard to foreign states. It recommended to the Committee of Experts to consider at its next meeting the question whether it was not desirable to formulate in connection with the process of codification, a declaration of the fundamental rights and duties of states. Finally, it requested the Council to have made, preferably by a committee of three experts selected from the Committee of Experts on Codification, a systematic survey of all matters to be covered by the work of codification and to consider the question of the advisability of publishing as an accompaniment to the Treaty Series and in the form of a code, the texts of the various international conventions which are now open to the acceptance of states in general.

Much attention was given by the Assembly to the elaborate report of the Special Committee on Arbitration and Security appointed in November, 1927, in pursuance of a resolution of the Eighth Assembly. The committee submitted with its report the drafts of three model general conventions and three model bilateral conventions drawn upon the same plan. The first two general conventions provide for a system of arbitration and conciliation; the third for a system of conciliation exclusively. In drafting the conventions the committee took into consideration the particular situations of the different states and the objections certain of them would doubtless feel in entering into arbitration conventions of an all inclusive character. The extent of the obligations of the three conventions was accordingly varied so as to meet the conditions and views of different states. All three of the general conventions, however, contain certain common provisions. On the whole, they are based on the past experience of states and contain very few innovations. In order to establish between the three general conventions a necessary connection or liaison, the committee drew up a General Act which in no way impairs their strength but preserves their essential character. It is described as a document which can be converted into a convention as soon as it is accepted in its entirety or in part by two states. The Assembly invited all states which had not already entered into arbitration treaties for the accomplishment of the same purpose to either become parties to the General Act or to enter into treaties with one another in accordance with the proposed model bilateral conventions.

The committee also submitted with its report the drafts of three model treaties of mutual assistance: one entitled a collective treaty of mutual assistance, one, a collective treaty of non-aggression, and one, a bilateral treaty of non-aggression. The first of these combines the three elements: non-aggression, peaceful settlement of disputes and mutual assistance to states which are victims of aggression. It differs from the Rhine Pact of Locarno in that it contains no clause guaranteeing the maintenance of the territorial *status quo*, provides for no guarantee by third states and allows

states which are not members of the League to become parties to the treaty, the guarantee clauses being omitted because it was feared that they would not be acceptable to certain Powers which would otherwise be willing to become parties. The two treaties of non-aggression obligate the parties not to attack or invade the territory of another and in no case to resort to war against another party, except in the exercise of the right of legitimate defense, that is, resistance to a violation of the above mentioned obligation, action in pursuance of Article 16 of the Covenant and action as the result of a decision of the Assembly or Council in pursuance of Article 15 of the Covenant. All three treaties contain detailed provisions in respect to the pacific settlement of disputes by means of conciliation, arbitration or judicial process.[1] The Assembly recommended these treaties for the consideration of all states, members of the League and non-members alike, and expressed the hope that they might serve as the basis for future engagements. The Assembly also recommended for the consideration of states a model treaty for strengthening the means of preventing war, submitted by the German delegation. Finally it adopted a resolution, drafted by the Committee on Arbitration and Security, designed to facilitate the further accession of states to the optional clause of the statute of the Permanent Court. In this connection it may be remarked that during the session of the Assembly two states, Spain and Hungary, signed the optional clause and it was announced that the parliament of Greece had authorized the Greek Government to accede to the clause.

The achievement of the Assembly in respect to disarmament was generally regarded as disappointing. The German delegation vigorously advocated the assembling of a disarmament conference during the year 1929, regardless of whether or not the Preparatory Commission had reached an agreement upon the technical questions which have hitherto delayed the assembling of the conference. The French delegation, on the other hand, maintained that the work of the Preparatory Commission should be completed and the technical differences regarding disarmament settled before the conference should be convened. The Assembly rather sympathized with the latter view. It considered it inexpedient to fix a date for the conference, but expressed a desire that the work of the Preparatory Commission and the Committee on Arbitration and Security should be further pursued and a report made to the Council suggesting a date when the conference might advantageously be summoned. Because the resolution of the Assembly did not fix a definite date for the meeting of the conference, the German and Hungarian delegations abstained from voting on it and expressed their disappointment at what they considered the failure of the Assembly to contribute anything to the advancement of the movement for disarmament.

[1] The report of the committee with the texts of its drafts of the various model conventions may be found in the League document No. C. 342. M. 100. 1928. IX and the annexes thereto.

Several political questions occupied the attention of either the Assembly or the Council. One of these was the controversy between Poland and Lithuania in respect to Vilna, a controversy which the Lithuanian Government refuses to regard as already definitively settled. The Lithuanian case was presented to the Council in a long and able address by the Prime Minister of Lithuania, M. Voldemaras. The Council, after hearing his plea, expressed its disappointment at the failure of the parties to come to an agreement through diplomatic negotiation, requested them to continue further negotiations, and indicated its intention, in case the negotiations failed, of having a special inquiry made by experts, after which the Council would take such steps as it deemed proper to settle the controversy. It was announced that diplomatic negotiations would be resumed at an early date.

Another political question on the agenda was the controversy between Hungary and Roumania regarding the rights of the Hungarian optants in Roumania. After hearing both parties, the Council adopted a resolution, to which the representatives of both parties agreed, recommending a resumption of diplomatic negotiations, which are now in progress. The Council was also occupied with several questions concerning the rights of minorities in Upper Silesia. It may be remarked, in this connection, that a plea was made to the Assembly by a delegate of the Netherlands for the creation of a special commission on minorities along the lines of the Commission on Mandates, but the proposal was vigorously opposed by a Czechoslovak delegate and nothing further came of it.

What may be regarded as a constitutional question was presented to the Council by the Government of Costa Rica in a communication of July 18th requesting an interpretation of the scope of the Monroe Doctrine, the validity of which is recognized by Article 21 of the Covenant of the League. The communication was in reply to a letter addressed by the President of the Council in March last urging Costa Rica to resume her membership in the League. By becoming a party to the Covenant Costa Rica would thereby endorse the Monroe Doctrine, the elasticity of which has raised much opposition throughout Latin America; she wished therefore for a definition of the thing which she was asked to endorse in order to be more certain of the obligations she was assuming. It will be recalled that this very question had been raised in 1920 by the Government of Salvador and for similar reasons. But in that case the request for a definition of the Monroe Doctrine was addressed to the Government of the United States, not to the Council of the League. The reply to Salvador's request is well known. The Costa Rican request raised an embarrassing question for the Council. Naturally it desired to encourage the return of Costa Rica to the League, and therefore wished to return a reply that would remove the obstacle which the Monroe Doctrine placed in the way. On the other hand, if the Monroe Doctrine was a unilateral policy of the United States, as the Salvadorean Government was told in 1920, the Council of the League of Nations was in no position to

interpret its scope and meaning. The Council in its reply, after reviewing the history of Article 21 and the circumstances under which the clause relative to the Monroe Doctrine found its way into the article, called attention to the fact that Article 21 merely referred to the Monroe Doctrine along with other engagements without attempting to define them, since it would have been inexpedient to do so because of the danger of restricting or extending their sphere of application. Besides, it lay outside the competence of the authors of the Covenant to do so, that power belonging to the parties to the engagements. For a still stronger reason it was beyond the authority of the Council to define them. The conclusion was that the Monroe Doctrine, as its validity was recognized and sanctioned in the Covenant, possessed no force or meaning which it did not possess at the time of the framing of the Covenant. As to what that is the Covenant is silent and the Council could not assume the right to declare what it is. Thus the efforts of both Salvador and Costa Rica to obtain enlightenment on the question failed. The reply of the Council to Costa Rica's communication appears to have been satisfactory to that government. In acknowledging its receipt the Government of Costa Rica merely replied that it would submit the Council's communication to the Congress.

In conclusion it may be remarked that the Assembly approved the choice of Ariana Park as the site for the new League buildings, and a committee was appointed to select from the nine plans submitted by the architects a plan for an Assembly building and a library. Funds for the construction of the former building have been appropriated by the Council and Assembly, while those for the latter have been provided by a generous gift from Mr. John D. Rockefeller. It is understood that the work of constructing both will begin at an early date.

J. W. GARNER.

THE WARSAW CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION

The Thirty-fifth Conference of the International Law Association was held August 9 to August 15, 1928, at Warsaw. About two hundred members were in attendance, including twenty-seven from the American Branch. The sessions were formally opened at the Palace of the Council of Ministers, in the presence of the President of the Republic, members of the government and the diplomatic corps.

The International Law Association was constituted in 1873 at Brussels, largely as the result of American initiative in which David Dudley Field took a prominent part. Its first conference was called soon after the sittings of the Geneva arbitration in the *Alabama* case and the adoption of a motion in the British House of Commons urging the government "to enter into communication with foreign Powers with a view to further improvement in international law and the establishment of a general and permanent system of

arbitration." From the beginning, the association adopted a pragmatic method. Following the scientific investigation of a particular problem, it proceeds to elaborate the texts for conventional agreement or for uniform legislation, as the case may require.

The Warsaw conference was held in two sections, a general assembly dealing mainly with public international law, and a maritime and commercial section. The conference approved a series of forty-eight articles governing the laws of war in occupied territory. These may be viewed as further elaboration and development of the last fifteen articles of the Hague Regulations respecting the Laws and Customs of War on Land (Arts. 42–56). Although not departing widely from the Lieber code, the proposed regulations place more emphatic restrictions upon military power in occupied territory. The key provision is contained in Art. 5:

> During the occupation the occupier has not, in the occupied territory, the rights of the territorial sovereign and shall only exercise rights of his own as far as necessary for the purpose of war, the maintenance of public order and safety and the due administration of the occupied territory.

For example, the inhabitants of the occupied territory shall not be called upon to take an oath of allegiance, or an oath of neutrality (Art. 6); but they are not to enter into any relation with the former government during the occupation (Art. 26). The occupier is not to abolish or suspend the rights of action of the inhabitants before the local courts, nor to levy contributions or new taxes (Art. II). The provisions of the draft seek to allow the normal life of the inhabitants to continue as far as consistent with the conduct of war, but they are not to be forced to supply the sinews of war against their former sovereign. The advance seems justified in view of the new attitude toward war embodied in treaties of the Kellogg type. The fact that a high military officer (Lieutenant-General Sir George Macdonough) presided during the discussion and took part in drafting the regulations, is some assurance that they do not depart too widely from the military standards of the practicable.

The draft will be known as the "Bellot Regulations of Laws of War in Occupied Territory," in honor of Dr. Hugh H. L. Bellot, Professor of Constitutional Law in London University, who died suddenly in Warsaw during the conference. He was Honorary General Secretary of the Association, and for many years had devoted his entire time to its work.

The conference approved a model treaty upon extradition. This is a subject upon which the League of Nations Committee of Experts considered agreement to be "very desirable," although they believed the difficulties in the way to be "too great for solution to be realized in the near future." By the conference draft, the perplexing problem of extradition for political crime is sought to be solved by granting the request for extradition in the case of fugitives "accused or convicted of having committed an act calculated to

destroy the life of a human being or to cause serious bodily injury," provided the *judicial* authorities of the required state determine that extradition should be granted notwithstanding the political character of the act (Art. 8).

A model convention relating to maritime neutrality adopted by the conference is an extension of the rules of the Hague Convention of 1907, with the addition of certain clauses developed from principles approved by the Washington Conference of 1922 and the Sixth Pan American Conference at Habana in 1928.

A tentative draft of international rules, regulating "c.i.f." contracts was prepared and will be submitted to the International Chamber of Commerce and other trade groups. An increasing amount of seaborne commerce is now carried under invoices of sales which include cost, insurance and freight. The many problems of risk and the relative duties of buyer and seller under the conflicting systems of law have made international regulation imperative. The "Warsaw Rules, 1928," when finally revised, will doubtless form the basis for more certain practices. No new legislation or conventions are contemplated or required, the draft being intended for adoption by trade associations and maritime bodies, much in the manner in which the York-Antwerp-Stockholm rules have gained widespread acceptance in regulating general average.

Among other subjects discussed at the conference which were advanced a step toward emergence from committee were the effect of war on private contracts, the conflict of laws in regard to contracts of sale, unfair competition in international commerce, international commercial arbitration, trade marks and international cartels.

The generous coöperation and hospitality on the part of the government and people of Poland served to make the conference an occasion of international good will. The large representation of German members was most significant. The conference presented an unusual opportunity to the jurists of twenty-six nations to observe the notable progress which the young republic has made under tremendous difficulties in a single decade.

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THE INTERNATIONAL STATUS OF TANGIER

A striking characteristic of the relation of guardian and ward in international relations until of recent years was that as a general rule the status was created for the benefit of the guardian rather than of the ward. The convention or treaty in the case might and often did pay public deference to the legal rights of the ward, but with this formality as a stage-setting, the guardians performed their semblance of fiduciary obligations with as much or as little concern for the interests of the ward as the claims of rival Powers or general public opinion might allow, and until of recent years there was little interference from the latter source. Even in cases where the conventional

agreement created definite obligations of trusteeship, the guardian state remained the sole interpreter of its duties, and there was no suggestion of an obligation to render a report, annual or otherwise, of the performance of its duties, as in the case of mandates under the Covenant of the League of Nations.

At times two or more states established a sort of coöperative guardianship over the subservient ward. If no one of them could be allowed to manage the affairs of the ward independently, then both or all three or four might work out a plan to be carried out in common. In such instances the ward stood, as a rule, a better chance of holding its nominal sovereignty intact, inasmuch as the guardians in their determination to check one anothers' ambitions were forced to keep their own claims within reasonable bounds. At the same time the ward in such cases was apt to lose the incidental advantages of control by a more highly civilized Power, for the division of responsibility among the guardians naturally resulted in an inefficient political administration.

The story of Tangier fits well into this picture, although the latest phase of its internationalized status gives better promise for the future. On July 25, 1928, Great Britain, France, Spain and Italy signed a new agreement intended to remedy certain defects of the earlier agreement of December 18, 1923, to which Italy had not been a party. The new joint guardianship of the four leading Powers with interests in the Mediterranean widens the international outlook of the administration of the protectorate, but it is very different from any such formal international government as is to be observed in the administration of Danzig. It is rather a condominium of select states, a limited board of trustees acknowledging no political responsibility to the nations of the world at large.

The problem of Tangier came upon the political horizon with the conclusion of the agreement between Great Britain and France, April 8, 1904, which recognized the predominant interest of France in Morocco, provided only that action taken by France should leave intact British rights enjoyed by treaties and custom, and leaving it to France to come to an agreement with Spain upon their respective interests. This agreement was followed on October 3 by the treaty between France and Spain in which it was agreed that Tangier should retain the special diplomatic character conferred upon it by the presence of the diplomatic corps and its municipal and sanitary institutions. The Act of Algeciras of 1906 assigned to the diplomatic body at Tangier special duties in regard to the government of Morocco in general, but its functions as a local administrative body within the city itself remained unchanged. Six years later, following the agreement between France and Germany of November 4, 1911, France and Morocco signed the treaty of Fez of March 30, 1912, which, in laying down the conditions of the French protectorate in Morocco, provided that Tangier should retain its distinctive character which would determine its municipal organization. In the Franco-

Spanish Convention of November 27, 1912, it was agreed that the city of Tangier and its outskirts should be provided with a special government which was to be determined by separate negotiations. The World War intervened to delay the adoption of the form of government contemplated, and it was not until December 18, 1923, that Great Britain, France and Spain finally signed the Convention regarding the Organization of the Statute of the Tangier Zone.

The "Statute" came into effect on June 1, 1925; but Spain, in spite of her ratification of the convention, was not satisfied with the share assigned to her in the administration of Tangier, and Italy, not being a party to the convention, refused to abandon her rights under the treaty of Algeciras. Interesting negotiations followed. Spain endeavored in the spring of 1926 to trade off her claims to a permanent seat on the League Council at Geneva for a concession to her demands for a larger influence at Tangier, and she suggested that either Tangier should be incorporated into the Spanish zone in northern Morocco or she be given a mandate to govern the zone. The mandate, however, as it turned out was to be not from the League but from the other signatories of the treaty of 1923. Thereupon the British Government, unwilling to concede the full measure of the Spanish demands, recommended that France and Spain come to an agreement over their respective interests at Tangier, on the basis of which a new conference could be assembled and Italy be made a party to the revised convention. Not until March 3, 1928, was it possible for France and Spain to reach an adjustment of their claims, but when that was once done it proved to be less difficult to meet the Italian demands, and by July 17 it was possible to initial the final protocol.

The chief document embodied in the protocol is the agreement revising the convention of December 18, 1923. As now reorganized, the outstanding features of the government of Tangier are as follows: legislative authority is vested primarily in an International Legislative Assembly consisting of twenty-seven members, Italy being given three members as against two in the Assembly of 1925. As France had previously controlled thirteen of the twenty-six members through her control of the nine members, six Moslems and three Jews, nominated by the "Mendoub," the representative of the Sultan, the slight increase in the membership of the Assembly is significant. The Committee of Control, consisting of the consular representatives of the signatory states of the Act of Algeciras, with its veto power upon legislation, remains unchanged, as does the position of the Mendoub as President of the Assembly. In the administration of the zone the French administrator, appointed for a term of six years, is to have as assistant administrators a Britisher in charge of finances, a Spaniard in charge of public health, and an Italian in charge of judicial business. The native police force put at the disposal of the administrator is to be in command of a Spanish officer and is to be supported by contributions from the Spanish and French Governments in equal proportions. A special Franco-Spanish bureau of information is to

be created, whose duty it will be to study facts bearing upon the security of Tangier in relation to the neighboring territory. The supervision of contraband arms and ammunition in the territorial waters of the zone is to be carried out jointly by Spain and France, but if need be the British and Italian naval forces may be called upon for service. The Italian Government, as well as the British, French and Spanish Governments, may attach to its consulate at Tangier an officer whose duty it will be to supervise the observance of the military clauses of the treaty. These clauses (Article 3 of the treaty of 1923) specify in detail the neutral and demilitarized character of the zone, which was earlier contemplated in Article 7 of the Franco-British agreement of 1904. Finally, the Mixed Court of Tangier, composed of British, French and Spanish magistrates, is to be enlarged by the addition of an Italian judge, while a Belgian judge is to succeed later to the position of one of the two British judges. Apart from these provisions relating to the organization of the government of Tangier, a letter annexed to the treaty specifically confirms the right of Italy, as provided for all nations under Article 7 of the Convention of 1923, to share equally in economic enterprises carried out in the Tangier zone.

There is reason to hope that the limited international government of Tangier may not be handicapped, as other similar governments have been, by dissensions among the several members of the condominium, each seeking to protect the particular interests that it has in view. Coöperation among the nations seems to be better understood in 1928 than it was before the World War, and the greater publicity now attending such undertakings is of itself a check upon undue pretensions and an influence in favor of the orderly adjustment of conflicting claims. We may, indeed, look with interest upon the competition in practicability and efficiency between such forms of international guardianship and the operation of mandates under the provisions of the Covenant of the League of Nations.

C. G. Fenwick.

THE PAN AMERICAN CONFERENCE ON CONCILIATION AND ARBITRATION

In the closing days of the Sixth International Conference of the American States, which assembled in Habana on January 16, 1928, and adjourned on February 20th of that year, a resolution was adopted for a meeting in the City of Washington, of two plenipotentiaries from each of the participating Republics in order to give conventional form and effect to a resolution adopting obligatory arbitration and providing for the submission of disputes to agencies of conciliation.[1]

The initiative in this movement was taken by the Mexican delegation, and on its behalf by Mr. Gonzalez-Roa, who skillfully availed himself of an extract

[1] Report of the Delegates of the United States of America to the Sixth International Conference of American States, Appendix 76, p. 320; this Journal, April, 1928, p. 357.

from Secretary of State Root's address at the laying of the cornerstone of the building of the Pan American Union on May 11, 1908,[2] adding on his now behalf, or rather on behalf of his delegation, that "war of aggression constitutes an international crime against the human species," and ending with two "resolves"—to use a New England expression—to the effect that: "(1) All aggression is considered illicit and as such is declared prohibited;" and "(2) The American states will employ all pacific means to settle conflicts which may arise between them." This was apparently a challenge to Mr. Hughes, who doubtless recognized the language of his distinguished predecessor and its implication. In his own name, and in behalf of the delegation and of the Government of the United States, he accepted the resolution. The tension of the conference, due to a prolonged and somewhat acrimonious discussion of intervention, was broken, and the logical consequences of the Mexican resolution and its latent implications were immediately drawn. Mr. Victor M. Maúrtua, of Peru, made this possible, suggesting that obligatory arbitration should be adopted in principle, that a minimum of obligation should be accepted, to which all of the American Republics could adhere, and those of them desiring the maximum of obligation could bind themselves to that effect with those who reciprocally accepted the proposal in an open or special protocol attached to the convention. Mr. Hughes accepted the proposal at once, and a committee was appointed to draft a resolution which was unanimously adopted, indeed, without discussion, upon its presentation.

The first "whereas" of the preamble condemns war "as an instrument of national policy" in the mutual relations of the American Republics, a phrase taken from the *Book on War* by the great Prussian General von Clausewitz, and suggested, it is understood, by Dr. Nicholas Murray Butler to M. Briand, Minister of Foreign Affairs of France, proposed by the latter to the Government of the United States for a treaty between the two countries in celebration of the 150th anniversary of their first treaties, and, through Secretary Kellogg's intervention and skillfull negotiations, incorporated in a multilateral treaty. In the first of the five resolutions, the American Republics adopt obligatory arbitration as the means which they pledge themselves to employ for "the pacific solution of their international differences of a juridical character." In the second, the Republics agreed within a year to a conference of conciliation and arbitration to realize in conventional form the principle of obligatory arbitration "with the minimum of exceptions" which they should consider (1) "indispensable to safeguard the independence and sovereignty of the states," (2) "matters of a domestic concern," and (3)

[2] ". . . There are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything." *Latin America and the United States—Addresses by Elihu Root.* (Cambridge, 1917), pp. 228, 230–231.

those involving the interest or referring to the action of a state not a party to the convention—a faultless, although disguised expression of the Monroe Doctrine, due to Mr. Hughes' practised hand. In the third of the resolutions the American Republics agree to send plenipotentiaries to the conference "with instructions regarding the maximum and the minimum which they would accept in the extension of obligatory arbitral jurisdiction." The fourth accepted the device of a protocol for "progressive arbitration" in order to develop it "up to its maximum." The fifth pledged the Republics to submit immediately to their respective governments the convention or conventions which might be agreed upon in their session at Washington within a twelve-month, in order that the agreement or agreements reached and put in conventional form should be ratified with the least possible delay.

Agreements on arbitration and conciliation were discussed in Washington, adopted and signed by the representatives of twenty American Republics—Argentina unfortunately not being represented on the 5th of January, 1929—and it is to be hoped that they will be not merely submitted to their governments for ratification at the earliest possible moment, but that they will be ratified and enter into the thought, the life and the practice of America, which would in this way and in no uncertain manner be dedicated to the peace of justice.

Leaving out of consideration the good offices in the boundary dispute which threatened war between Bolivia and Paraguay on the eve of the conference, their acceptance and the formulation of texts by the conference for mediation, as this matter is discussed elsewhere in the JOURNAL, it will only be necessary to consider the two great questions before the conference—arbitration and conciliation—regarding both of which it was able to agree on conventions, although in so brief a space as is necessarily allotted to an editorial comment, it will scarcely be possible to do them justice.

Obligatory arbitration of disputes of a juridical character had been adopted in the Habana resolution, and in the minds of the delegates it existed as a *fait accompli*, but according to the resolution three exceptions were to be made: (1) independence and sovereignty; (2) matters of domestic concern; (3) the Monroe Doctrine. The United States had in its recent treaty of February 6, 1928, with France, omitted the thorny question of sovereignty, and the American delegation consented to its omission in the convention of the American Republics. Domestic concerns and the Monroe Doctrine alone remained. There must be some method of deciding when a question is or is not domestic. If each country were to decide the matter for itself, it is to be feared that the decision would inevitably be political.

Mr. Maúrtua continued in Washington his rôle of "path-finder," suggesting that domestic matters should be such as international law decides. For example, immigration is a domestic question; it is regarded by international law as such, and would be excluded from the obligation to arbitrate. The

adoption of international law as the standard of decision is more than a way out of a difficulty to the international highway; it recognizes the existence of an international community of which each and every civilized nation is by its very existence a member, and of international law which exists universally, express or implied, by the mere coëxistence of nations. The test is no longer to be the nation in a matter of international concern; it is to be the law of the international community, on the very simple theory that the whole is, after all, greater than any of its parts. This is as it should be, at least in the opinion of the present writer, and he avails himself of the opportunity of an editorial comment to express his appreciation of the services of Messrs. Maúrtua and Hughes who have made the acceptance of this standard possible.[3]

Mr. Hughes' clause which impliedly exempts the Monroe Doctrine, or rather exempts it expressly without mentioning its name, is evidence both of skill in drafting and of statesmanship in conception. It is natural that non-contracting states should not be parties to an arbitration, and it might be considered that that phase of the subject was sufficiently safeguarded by the term "interest." But how about the action of a state foreign to the convention, contrary to what the Monroe Doctrine is, or is conceived to be? The clause referring to "the action of a state not a party to the convention" withdraws the matter from arbitration. By the first article of the convention on arbitration questions are juridical "by reason of being susceptible of decision by the application of the principles of law." This would include all domestic questions, unless they are controlled by international law in accordance with the provisions of Article 2.

[3] Mr. Hughes thus expressed his views on January 3, 1929, when the question was under discussion in the Conference:

". . . We have in mind two fields of obligations: Those where the obligations are created in the exercise of sovereignty and which fall within the domestic jurisdiction; and, the other obligations, which are created by international law and which are not susceptible of final determination through local tribunals without the intervention of an appropriate international tribunal. In other words, where a treaty is concerned, for example, or matters which have given rise to rights under international law, the appropriate resort, if the parties cannot dispose of the controversy amicably, is to an international tribunal. We have sought to provide the means for constituting such a tribunal in this treaty.

"So these two sources, domestic jurisdiction and international jurisdiction, stand separate, the one governed by the law of the sovereign state, the other governed by the international law which consists of those principles and rules which states have accepted as governing the relations that exist between them.

"When we say in the first exception: 'And are not controlled by international law,' we have obvious reference to those situations in which matters would otherwise fall within the domestic jurisdiction have, by reason of an international transaction, through treaty for example, become the subject of international consideration because they import international obligations.

". . . But perhaps I may be allowed to make the suggestion that under this treaty no state is deprived of any right that it has under international law, and no state, of course, is relieved of any obligation which it may have under international law."

The first article cites examples—not an enumeration of questions of a juridical character: "the interpretation of a treaty," universally recognized as juridical; "any question of international law," also universally accepted, or at least by members of the Society of Nations; "the existence of any fact which, if established, would constitute a breach of an international obligation," likewise universally accepted or at least by the members of the Society of Nations; and the same is to be said of "the nature and extent of the reparation to be made for the breach of an international obligation." These are to be found in Article 13 of the Covenant of the League of Nations.

How is the obligation of Habana which has passed over to the Convention of Washington to be rendered effective? Article 3 answers the inquiry and it follows in its entirety:

> The arbitrator or tribunal who shall decide the controversy shall be designated by agreement of the parties.
>
> In the absence of an agreement the following procedure shall be adopted:
>
> Each party shall nominate two arbitrators, of whom only one may be a national of said party or selected from the persons whom said party has designated as members of the Permanent Court of Arbitration at The Hague. The other member may be of any other American nationality. These arbitrators shall in turn select a fifth arbitrator who shall be the president of the court.
>
> Should the arbitrators be unable to reach an agreement among themselves for the selection of a fifth American arbitrator, or in lieu thereof, of another who is not, each party shall designate a non-American member of the Permanent Court of Arbitration at The Hague, and the two persons so designated shall select the fifth arbitrator, who may be of any nationality other than that of a party to the dispute.

There is only space in the comment for another article. It is the fourth, which speaks for itself, or as to which it need only be said that it enables the case to be submitted to the tribunal of arbitration, as it proposes the method of formulating the special agreement when the parties themselves have been unable to do so:

> The parties to the dispute shall formulate by common accord, in each case, a special agreement which shall clearly define the particular subject-matter of the controversy, the seat of the court, the rules which will be observed in the proceedings, and the other conditions to which the parties may agree.
>
> If an accord has not been reached with regard to the agreement within three months reckoned from the date of the installation of the court, the agreement shall be formulated by the court.

To carry out Mr. Maúrtua's suggestion in Habana, a protocol of progressive arbitration was drafted and signed on January 5, 1929, to accompany the convention on arbitration, of which protocol the material provision is Article I:

> Any party to the General Treaty of Inter-American Arbitration signed at Washington the fifth day of January, 1929, may at any time

> deposit with the Department of State of the United States of America an appropriate instrument evidencing that it has abandoned in whole or in part the exceptions from arbitration stipulated in the said treaty or the reservation or reservations attached by it thereto.

This is unfortunately a necessary agreement inasmuch as but seven states, Brazil, Cuba, Haiti, Nicaragua, Panama, Peru, and the United States, signed the arbitration convention without reserves, in which the undersigned is rejoiced to see the name of the United States. The thirteen others have a variety of reservations which they believe to be in their respective interests, a general one being the limitation of arbitration to future disputes; another is the limitation of the obligation to arbitrate to disputes which, submitted to the national courts, have resulted in a denial of justice, etc.

The convention on conciliation is an elaborate and complicated document. The conference found itself in the presence of the treaty to avoid or prevent conflicts between the American Republics, signed at Santiago de Chile, May 3, 1923. It is, in effect, an agreement to submit disputes of all kinds to a commission of inquiry, and is also in fact an adaptation of Secretary of State Bryan's treaties for the advancement of peace which, proposed to the Fifth of the Pan American Conferences at Santiago de Chile, by Mr. Gondra, former President and delegate of Paraguay, is often called in his honor the Gondra Convention. It has been ratified by fourteen Republics, the United States among others. It seemed therefore advisable to take as a basis what may be called a "going concern," and to invest it with the functions of a commission of conciliation. The Gondra Convention provided for the submission of all disputes, which were not taken care of otherwise, to investigation and report, and that during the proceedings there should be no resort to hostile measures, much less to war; that the parties in dispute wishing to avail themselves of the services of the commission should, in the first place, address themselves according to their preference to a permanent commission composed of the three American diplomatic representatives the longest accredited to Montevideo in Uruguay, or to Washington in the United States, which should provide for the appointment of a commission of five members, all of them to be nationals of the American Republics, two to be appointed by each of the parties in dispute, of whom only one could be its national; and the fifth member, who should likewise be an American but a national of neither party to the dispute, to be appointed by common accord of the four members, or, that failing, through a method provided by Article 4. The report when submitted was not to be binding upon either of the parties, but hope was expressed in Article 7 that either party might bring about a settlement in accordance with the findings of the report, although if they failed to do so within six months after the presentation of the report, the parties were to regain their freedom of action. The conciliation convention of Washington presupposes the ratification of the Gondra Convention.

The important article of the conciliation convention is the third, providing

that the permanent commissions of the Gondra Convention were to exercise conciliatory functions, "either of their own motion when it appears that there is a prospect of disturbance of peaceful relations, or at the request of a party to the dispute," until the commission provided for in the Gondra Convention should be composed in accordance with its fourth article.

The fourth article of the conciliation convention provides the manner in which the commission shall function. It may endeavor to bring about a settlement between the parties without going through the forms of conciliation; it may essay to do so while it is prosecuting its conciliatory measures, and, in any event, it must carry out its functions as a commission of conciliation within the period six months. The commission itself, being that of the Gondra board of investigation, is to consist of five members appointed, as stated above, by the fourth article of the Gondra Convention. When the commission is under way, it shall continue its proceedings unless the parties themselves agree to a direct settlement, or accept the decision "*ex aequo et bono* of an American Chief of State," or agree to submit the controversy "to arbitration or to an international court."

Only what may be called the substantive functions of the commission can be considered in a comment of limited extent. Therefore it must suffice to say that the commission is authorized to form its rules of procedure but, should it fail to do so, the Gondra Convention is to apply. Its recommendations shall be neither a decision nor an arbitral award. The report, which does not bind the parties in conflict either as to the facts or the law, is to be transmitted to them, and the period is not to exceed six months within which they shall pass upon the bases of settlement proposed by the commission. "The commission shall," at the expiration of its functions, "set forth in a final act the decision of the parties, and if the conciliation has been effected, the terms of the settlement."

Such are the main provisions of the convention on conciliation. Wisely the conference accepted the Gondra Convention as the basis of its deliberations, vesting it with the functions of a commission of conciliation, with the differences required, in the opinion of the conference, to enable the commission of investigation to act as a commission of conciliation. It had something permanent at its disposition, the existence of the two commissions of diplomatic agents at Montevideo and in Washington which might with propriety be called "preparatory commissions"; for to be effective international bodies should be in existence before the disputes, and the machinery should be automatic, or set in motion by one or other of the parties. It is to be hoped that the two conventions will be ratified, and that the protocol will be largely used in order to restore the convention on arbitration to its original form as signed by the seven American Republics without reservation. The convention of arbitration is a long step in advance; the conciliation convention is an acceptable document. It is, of course, desirable that disputes should not arise which the contracting parties can not easily and rapidly

settle by direct negotiation; but if they can not thus settle them, it should be a God-send to have a convention of arbitration such as drafted by the Conference of Washington, provided only it be ratified by all of the contracting parties, and that those which have interposed their reservations should find it possible to withdraw them as the result of experience.

President Coolidge opened the conference on the 10th day of December, 1928, and it was proper that he should do so, not only because the delegates met in Washington at the call of the United States, but because he had opened the Habana Conference, of which the Washington Conference was in a sense the continuation. His address was full of good will and of generous aspirations. He felt and he said that "the nations of the Western Hemisphere . . . have a common purpose to advance the cause of civilization by substituting the obligation of reason for the coercion of force." In this he was right. It was well said, and it was the time to say it. "From the earliest period of their independent existence the Americas have held," he continued, "an advanced position in their advocacy of the orderly settlement of international disputes." And he instanced examples, especially the first conference of an inter-American character, held at Panama in 1826, in which a treaty was signed to the following effect:

> The contracting parties solemnly obligate and bind themselves amicably to compromise among themselves all differences now existing or which may arise in the future, and in case no settlement can be reached between the disagreeing powers the question shall be taken for settlement to the judgment of the assembly, whose decision shall, however, not be obligatory unless said powers shall have expressly agreed that it shall be.

He added to this admirable statement of a determination to settle American disputes peaceably—then an ideal which is now in the process of realization—speaking as President of the United States, advisedly and to the point, "History clearly asserts that at this early period the Republics of America made both conciliation and arbitration integral parts of their national policy." And he assured the delegates that "the foundations" of their work had been laid "by the unbroken practice and policy of the American Republics," because of the fact that Venezuela, Ecuador, the Dominican Republic, Brazil, and Uruguay, had raised "the arbitration of international disputes to the dignity of a mandatory constitutional principle." He then expressed two opinions which can not be too often voiced, and, true as they are, appear to receive additional importance because stated by a person holding exalted office. It is "by the adherence to such methods that nations as well as men develop a peaceful character. . . . Tribunals have been established for the purpose of doing justice between man and man," to which the injured parties may resort and have their disputes settled by what may be called due process of law. He added what we all know, but which it would be a good thing for all states to practice as well as to profess: "When this principle has been well

established, when it has had the benefit of experience, it becomes so much a habit of thought that the people feel no inclination to resort to some method of direct and personal action." The value of arbitration, he said, lies in the fact that "it both furnishes knowledge and assurance that differences will be adjusted and also adjusts them." The process "is bringing the different nations of the world to corresponding standards." And "Governments," he added, speaking for that of which he is the Chief Executive, "are coming to see that it is by no means in derogation of their dignity to submit their differences with each other to the decision of an impartial tribunal." It was here that the President put his finger on the great desideratum—permanent procedure, with permanent tribunals in being, without needing to be constituted at the very time when the parties in conflict were least inclined to create them. "We shall greatly promote this spirit if we provide ourselves before the event with the necessary judicial machinery and promulgate rules of procedure to govern the composing of differences." This is an excellent general statement, but the President deals in the concrete as well. "Neither individuals nor nations could make much progress in this direction if, when a dispute arose, it was necessary to establish a tribunal and determine on the rules of action before anything could be done about the real controversy."

Apparently he spoke with an eye to practice and as one who had had experience in forming international tribunals. "To be compelled to stop to go through that process," the language is his, "would probably result in having not one dispute, but many differences of opinion." And he ends with the statement which is universally true, but which assuredly has never been better put: "An implement becomes manifoldly more valuable if it is already at hand when needed."

The Permanent Court of Arbitration at The Hague, which is in reality a panel or list of judges from which or from whom a temporary tribunal may be composed for the trial and disposition of the case, has given way to a Permanent Court of International Justice at The Hague, which, because of its authority to decide *ex aequo et bono* at the request of the parties having the case before it, is to that extent a permanent board of arbitration. The process is inevitable, the temporary giving place to the permanent. Many there are who have dreamed of American tribunals of arbitration for the settlement of inter-American disputes according to principles of justice expressed in rules of law adopted for this purpose by the American Republics. If these conventions are to be interpreted in first instance by the ministries of foreign affairs of the respective Republics when differences arise between them, it would seem that a tribunal composed of American judges might continue the process, and either through the boards of inquiry, commissions of conciliation, arbitral tribunals or an Inter-American Court of Justice, resolve the conflicts before they have assumed dangerous proportions. The Gondra Commission of Inquiry and the Washington Convention of Conciliation provide for commissions composed exclusively of

American members; the Washington Convention of Arbitration provides in its third article for a tribunal of five which may, in the opinion of the parties in dispute, be composed exclusively of American members. This is as it should be. It is to be hoped that the President's suggestion, which is a pleasing forecast, if it be not an express prophecy, may hearten the sons of America to give the element of permanency hitherto lacking in their institutions, and shall establish in an American capital in the near future an Inter-American Court of Justice composed of American judges, for the interpretation and application of American law made by the American Republics in conference for the settlement of their disputes by that due process of law which may be appropriately called an American shibboleth.

JAMES BROWN SCOTT.

CURRENT NOTES

By George A. Finch

ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The twenty-third annual meeting of the American Society of International Law will be held in Washington April 24–27, 1929. Following the suggestion made at the last annual meeting that more time be provided for discussion, the annual meeting in April will open on Wednesday evening instead of Thursday, as has usually been the case heretofore. The opening session on Wednesday evening, April 24, will be of a formal character at which the President will deliver his annual address, to be followed by a reception and social gathering of the members. It is possible that some other prominent speaker may be obtained for the evening. The sessions for the discussion of the Society's program, the topics and speakers of which will be announced later, will be held on the mornings, afternoons and evenings of Thursday and Friday, April 25 and 26, and on the morning of Saturday, April 27. The meeting will end with the annual dinner on Saturday evening, April 27. All of these functions will be held at the customary place of meeting, the Willard room of the Willard Hotel.

The report of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law will be submitted on Wednesday evening and discussed at the session on Thursday morning. The luncheon of the Board of Editors of the American Journal of International Law will also take place on Thursday, April 25, at 12.30 o'clock, and the Executive Council of the Society will meet on the afternoon of the same day at 3 o'clock at No. 2 Jackson Place. An effort will be made to have the members of the Society received at the White House by President Herbert Hoover at a convenient time on the program. As soon as the details of the program have been definitely worked out, it will be printed and mailed to all members of the Society, together with reservation cards for places at the annual dinner.

All members of the Society in good standing are entitled to attend all the sessions of the annual meeting and to take part in the discussions. They are also entitled to attend the annual dinner with their guests upon payment in advance for each place reserved at the price fixed for the dinner, which is usually $5.00 per place. Members who desire information as to hotel accommodations for the meeting may obtain such information by writing to Mr. George A. Finch, Recording Secretary of the Society, No. 2 Jackson Place, Washington, D.C.

CARNEGIE ENDOWMENT FELLOWSHIPS IN INTERNATIONAL LAW

The Division of International Law of the Carnegie Endowment for International Peace announces that Fellowships in International Law will be awarded for the academic year 1929–1930 upon the same terms and conditions as the Endowment has awarded these Fellowships in previous years. The Fellowships are divided into two classes: (1) Teachers' Fellowships, and (2) Students' Fellowships. The former carry a stipend of $1,500, and the latter a stipend of $1,000. Teachers' Fellowships awarded for study abroad carry an additional stipend of $300. In general, a knowledge of the elements of international law and a good knowledge of history are necessary, and it is desirable that at least two modern languages be furnished. Other special previous preparation will also be considered. An applicant who wishes to study abroad must be able to read and write the language of the foreign country in which he elects to study. Application blanks and other information may be obtained from the Committee on International Law Fellowships, 2 Jackson Place, Washington, D. C. Applications will be received up to March 1, 1929.

L'INSTITUT INTERNATIONAL DE DROIT PUBLIC[1]

The 1928 meeting of the International Institute of Public Law was held in the University of Paris October 20 and 22, 1928, under the presidency of M. Gaston Jèze. A project dealing with the internal organization of the Institute was adopted, and it was decided to issue an annual publication to contain a report of constitutional and political changes in all countries and their principal public laws and decisions. Discussions took place on a report by M. Kelsen upon the jurisdictional sanction of constitutional principles, and a report by M. Jèze upon the juridical significance of public liberties. These discussions will be reproduced in special publications of the Institute. It was also decided to make a critical examination of the Declaration of the Rights of Man, and to study different individual liberties, commencing with property. The next session will be held during the last week of June, 1929.

RECIPROCAL ACCESS TO PETROLEUM RESOURCES[2]

After negotiations which have been pending for some time past, an understanding has been reached between the United States and the Netherlands concerning reciprocal access to petroleum resources. The Netherland Government has assured the Government of the United States that its law and policy are such as will permit participation of American interests in the development of oil lands of the Dutch East Indies. The Government of the United States has in turn informed the Netherland Government that it recognizes the Netherlands as a reciprocating state within the terms of the Min-

[1] For an account of the organization of the Institute, see this JOURNAL for October, 1927 (Vol. 21), p. 768.

[2] State Dept. press release, Sept. 17, 1928.

eral Leasing Act of February 25, 1920, which provides in part as follows: "That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this act."

CLEARING UP TITLES TO ISLANDS IN THE WESTERN CARIBBEAN SEA[1]

On March 24, 1928, a treaty was signed at Managua by the representatives of Colombia and Nicaragua looking to the settlement of the long-standing dispute between those countries with regard to the ownership of certain islands in the western Caribbean Sea. The treaty recognized Nicaragua's sovereignty over the Mosquito Coast and over Great and Little Corn Islands, and Colombia's sovereignty over the Islands of San Andres, Providencia, Santa Catalina, and all the other islands, islets and cays which form a part of the Archipelago of San Andres, not including the cays of Roncador, Quita Sueño and Serrana, title to which was in dispute between Colombia and the United States.

The status of these latter islands was fixed by an exchange of notes at Washington between Colombia and the United States on April 10, 1928. The notes declared that

> Whereas the interest of the United States lies primarily in the maintenance of aids to navigation; and whereas Colombia shares the desire that such aids shall be maintained without interruption and furthermore is especially interested that her nationals shall uninterruptedly possess the opportunity of fishing in the waters adjacent to those islands, the *status quo* in respect to the matter shall be maintained and the Government of Colombia will refrain from objecting to the maintenance by the United States of the services which it has established or may establish for aids to navigation, and the Government of the United States will refrain from objecting to the utilization, by Colombian nationals, of the waters appurtenant to the islands for the purpose of fishing.

STERLING FELLOWSHIPS

Applications for Sterling Fellowships for research in the humanistic studies and natural sciences will be received up to March 1, 1929, by the Dean of the Graduate School of Yale University, New Haven, Connecticut, on blanks which may be obtained from him. The Fellowships have been established by a gift from the trustees of the estate of the late John W. Sterling to stimulate scholarship and advanced research in all fields of knowledge. They are open to graduates of Yale University and other approved universities and colleges in the United States and foreign countries, to both men and women, whether graduate students, or instructors or professors when on leave of absence, who desire to carry on studies and investigations under the direction of the Faculty of the Graduate School of Yale University or in affiliation with

[1] State Dept. press releases, Sept. 21, 1928.

that body. The stipends of the Fellowships range from $1,000 to $2,500 or more, dependent upon the previous experience of the recipient and the character of the proposed investigation.

THE INSTITUTE OF POLITICS

During every session which the Institute of Politics has held since its establishment in 1921, some parts of its annual program have been devoted to public or private international law. In the earlier years, the peace treaties and international legal principles that had been thrown into doubt by the war naturally offered subjects for discussion. In the latter years, with the growth of our commercial and financial relations with foreign countries, the topics which the Institute has taken up have been in the field of private international law, and such questions as the protection of citizens and their property abroad have been discussed. Among the notable authorities on the subject of international law who have conducted conferences at Williamstown are George Grafton Wilson, James W. Garner, Jesse S. Reeves, Arthur K. Kuhn, Pierre Lepaulle, and Edwin M. Borchard.

The eighth session of the Institute of Politics met August 2–20, 1928. Addresses were delivered by Count Carlo Sforza, former member of the Italian Senate, on "The Responsibilities for the World War: Personal Recollections;" Dr. Chao Chu Wu, former Secretary for Foreign Affairs of the Nanking Government, on "The Domestic and Foreign Program of the Kuomintang;" Dr. Y. C. James Yen, leader of the Mass Education Movement in China, "The Task of Educating China's Millions for Citizenship."

Lecture courses were conducted by the following: "Modern Turkey and its Problems," by Halidé Edib Hanum, leader of the feminist movement in Turkey; "Germany's Foreign and Domestic Policies," by Dr. Otto Hoetzsch, member of the Reichstag and Professor of History at the University of Berlin; "Current Political Problems in Belgium," by Dr. Louis Pierard, member of the Belgian Parliament and Reporter of the Budget of the Ministry of Foreign Affairs; "Means of Social Direction," by Dr. Graham Wallas, Professor Emeritus of Political Science at the University of London.

The following is a list of the round-table subjects with their respective leaders: "The Problems of the Pacific," George H. Blakeslee, Clark University; "Protection of Citizens Abroad," Edwin M. Borchard, Yale University; "Inter-American Economic and Commercial Relations," Harry T. Collings, University of Pennsylvania; "Agriculture and the Agricultural Surplus: An International Approach," Charles R. Fay, University of Toronto; "Recent Inter-American Relations and Problems," Charles W. Hackett, University of Texas; "Modern Turkey and its Problems," Halidé Edib Hanum, London; "Population Problems on the Pacific Rim," Roderick D. McKenzie, University of Washington; "Social Direction," Dr. Graham Wallas, London School of Economics.

Four general conferences on "Problems of Africa" were conducted by Dr.

Raymond L. Buell of the Foreign Policy Association. As the Pact of Paris was signed during the session of the Institute, some occasion was made for the exposition of the meaning of the Pact and discussion of its consequences for the United States in a general conference on "The Kellogg Treaties." The interest in the discussion of the Kellogg treaty was in the main due to the criticism directed against it by Professor Borchard. A general conference was held also on "Prohibition."

The Institute publishes an annual report, including an outline and selected bibliography for each of its conferences, and a summary of all the main ideas developed by the conference leaders, lecturers and members of the Institute. Copies may be obtained from the office of the secretary, 1 Hopkins Hall, Williamstown, Mass.

The ninth session of the Institute of Politics will be held from August 1 to August 30, 1929.

THE NOVEMBER ELECTIONS IN NICARAGUA[1]

General elections in Nicaragua were held on November 4, 1928, under the supervision of American officials in accordance with the request of the President of Nicaragua addressed to the President of the United States on May 15, 1927, and President Coolidge's compliance therewith pursuant to the program of reconciliation and reconstruction arranged by the Honorable Henry L. Stimson, who was sent to Nicaragua by President Coolidge in the spring of 1927 to compose the differences between the contending factions in the Civil War which was then devastating that country.[2] The elections resulted in a victory for the Liberal Party, and General José Maria Moncada, who commanded the revolutionary forces in the field before Mr. Stimson's successful mission, became President of Nicaragua by virtue of the ballots instead of the bullets of his countrymen. In a total vote of 133,663, the Liberal Party candidates received a majority of about 20,000.

The elections were conducted under the general supervision of a National Board of Elections composed for the occasion of a member representing each of the parties in Nicaragua, Conservative and Liberal, and of General Frank R. McCoy, United States Army, as chairman. The National Board appointed a Departmental Election Commission in each Department, and a local election board for each polling place. The departmental commissions and local boards were also composed of three members, one Conservative, one Liberal, and an American chairman. The armies of the contending factions had been disbanded, and American marines assisted in maintaining order, in registering the voters, and in conducting the elections. This assistance was specifically suggested by the President of Nicaragua in a

[1] Based upon information contained in official press releases of the Department of State.

[2] See this JOURNAL, Vol. 21, pages 539–541. For the text of the letters exchanged between Presidents Diaz and Coolidge, see Supplement to this JOURNAL for July, 1928 (Vol. 22), pages 118–121.

memorandum accompanying his letter of May 15, 1927, in which he requested "that the President of the United States will permit a sufficient force of American marines to remain in the country pending the organization and instruction of the Constabulary and during the election to reinforce the work of the Constabulary in securing an absolutely impartial election between both parties." Enlisted men of the American Marine Corps served as precinct chairmen during the registration and voting. These men underwent three months' training at schools established in each province before they were assigned to their precincts. The curriculum included an intensive course in Spanish and in electoral regulations.

No instance of disorder on election day occurred in any part of the Republic. The voting proceeded smoothly and was concluded before the official closing time of the polls. Fifty thousand more votes were cast than in the election held four years previously. The satisfactory results are considered to be due to the coöperation of the American services and the Nicaraguan National Guard to protect voters from intimidation by their political opponents. A chemical stain used to mark a finger of each voter was accepted in good humor, prevented repetition, and inspired popular confidence in the result. At a joint session of the Nicaraguan Congress held December 28, 1928, the report of the National Board of Elections was approved with but one dissenting vote and General Moncada and Dr. Enoc Aguado were declared the constitutionally elected President and Vice President.

After observing the registration of voters during the period from September 23 to October 7, General Moncado, on October 19, addressed a letter to Señor Don Adolfo Benard, the Conservative Party candidate, proposing a continuance of American supervision in future elections in the following terms:

> Now that we are witnessing the justice with which those in charge of the American supervision are proceeding, when with generous and praiseworthy earnestness they are extending us their hand in the development of republican institutions, by means of a true and honest electoral liberty, we who desire an era of peace and of industry for Nicaragua, could agree to accept this same supervision for one or several periods more of constitutional government.
>
> For my part I can now promise you, when the occasion arrives, that if the Liberal Party wins it will pledge itself to correspond to the good will of the American Government for absolutely free elections, promising at this time, if it suits the interests of the Conservative Party, that in the subsequent presidential election I will willingly accept the mediation of the United States in the same form and manner which the Stimson agreements established.

Señor Benard definitely accepted this proposition on the following day, stating

> We will finish once for all with those lamentable internal struggles which you mention and which have cost us so much blood and so much national wealth in the past.

> The American supervision has come to give us the enjoyment of that electoral freedom which without any doubt will bring with it for the welfare of all, Liberals as well as Conservatives, a long and fruitful era of national tranquillity.

After the results of the election were known, the chief Conservative newspaper, *La Prensa*, declared "The American supervision has honorably observed its promise. The elections Sunday were honest, tranquil, correct and honorable. The Liberals obtained the victory." The leading Liberal organ, *El Commercio*, declared "The United States is vindicated before the world." Later President Diaz telegraphed to President Coolidge expressing appreciation of the impartiality and justice with which the American officials acted during the election period, "as a result of which the people of Nicaragua again thank the American Government for the friendly coöperation and interest which it has always taken in order that peace and national prosperity may obtain in this Republic."

LATE CLAIMS BEFORE THE GERMAN-AMERICAN MIXED CLAIMS COMMISSION

An agreement was concluded between the United States and Germany by notes exchanged on December 31, 1928, with respect to the submission to the Mixed Claims Commission of so-called late claims.[1] By the terms of notes exchanged between the two governments at the time of signing the claims agreement on August 10, 1922, it was provided that notice of all claims should be submitted to the Mixed Claims Commission within a specified period of time. Several thousand claimants for one reason or another failed to file with the Department of State or with the American Agent before the Mixed Claims Commission notice of their claims within the time prescribed by the two governments for filing notice with the commission. Section 2 (j) of the Settlement of War Claims Act of 1928, approved by the President on March 10, 1928, provided that:

> The President is requested to enter into an agreement with the German Government by which the Mixed Claims Commission will be given jurisdiction of and authorized to decide claims of the same character as those of which the commission now has jurisdiction, notice of which is filed with the Department of State before July 1, 1928. If such agreement is entered into before January 1, 1929, awards in respect of such claims shall be certified under subsection (a) and shall be in all other respects subject to the provisions of this section.

Shortly after the passage of this Act, the Department of State took up with the German Government the matter of concluding an agreement extending the jurisdiction of the commission to include late claims which had been notified to the Department of State prior to July 1, 1928. The agreement which was concluded on December 31, 1928, provides, among other things, that all such late claims of the character of which the Mixed Claims

[1] State Dept. press release, Jan. 2, 1929.

Commission now has jurisdiction under the agreement of 1922 shall be presented to the commission with supporting evidence within six months from February 1, 1929. The German Government is allowed six months in which to present its reply to each claim filed. The agreement will not permit of the submission of claims unless they were notified to the Department of State prior to July 1, 1928.

Conference with Canada on Smuggling. A conference will be held at Ottawa beginning January 7, 1929, to discuss the general subject of commercial smuggling between Canada and the United States. The delegation of American officials who will take part will be headed by Admiral F. C. Billard, Commandant United States Coast Guard, James M. Doran, Commissioner of Prohibition, and E. W. Camp, Commissioner of Customs.[1]

Preservation of Niagara Falls. Following an extensive investigation and study of the subject by an International Board created in 1926, the United States and Canada concluded a convention on January 2, 1929, providing for the construction of remedial works in the Niagara River for the purpose of maintaining and improving the scenic beauty of the Niagara Falls and Rapids. The convention and an accompanying protocol prescribing in detail how the work is to be done follow closely the recommendations of the International Board.[2]

New Arbitration Treaties of the United States. Arbitration treaties similar to the model treaty concluded with France on February 6, 1928,[3] have been signed by the United States during the year 1928 with the following countries: Austria, Albania, Czechoslovakia, Denmark, Finland, France, Germany, Italy, Poland, Sweden and Lithuania. Negotiations for such treaties are in progress with Great Britain, Japan, Norway, Spain, Portugal, Hungary, Belgium, The Netherlands, Switzerland, Latvia, Estonia, Turkey, Bulgaria, Rumania, Greece, The Kingdom of the Serbs, Croats, and Slovenes, Siam, Luxemburg, Egypt, Persia and China.

[1] State Dept. press release, Dec. 28, 1928.

[2] *Ibid.*

[3] Printed in Supplement to this JOURNAL, April, 1928 (Vol. 22), p. 37.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16, 1928–NOVEMBER 15, 1928

(With references to earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. I. I.*, Bulletin de l'Institut Intermédiaire International. *B. I. N.*, Bulletin of international news; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; G. B. *Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. Q. B.*, League of Nations Quarterly Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. press notice; *R. D. I.*, Revue de Droit International; *R. G. D. I. P.*, Revue Générale de Droit International Public; *R. D. I. P.*, Revue de Droit International Privé; *R. J. I. L. A.*, Revue Juridique International de la Locomotion Aérienne; *R. R.*, American Review of Reviews; *U. S. C. R.*, U. S. Commerce reports.

February, 1928

13 GREAT BRITAIN—HAITI. Signed agreement concerning direct exchange of parcels by parcel post. *G. B. Treaty Series*, no. 18 (1928), *Cmd.* 3193.

April, 1928

10 COLOMBIA—UNITED STATES. Exchanged notes regarding sovereignty over Serrana and Quita Sueño Banks and Roncador Cay (Caribbean Sea). *Press notice*, Sept. 21, 1928.

May, 1928

28 SPAIN—SWEDEN. Signed revision of commercial agreement of May 4, 1925. *U. S. C. R.*, Oct. 8, 1928, p. 129.

June, 1928

12 FRANCE—GREAT BRITAIN. Signed money order agreement, applicable to Syria and the Lebanon. Text: *J. O.*, Sept. 23, 1928, p. 10455. *G. B. Treaty Series*, no. 19 (1928), *Cmd.* 3202.

19 INTERPARLIAMENTARY COMMERCIAL CONFERENCE. Met at Versailles. *Times* (London), June 23, 1928, p. 16.

20 NETHERLANDS—PERSIA. Temporary commercial agreement signed at Teheran. *U. S. Daily*, Oct. 24, 1928, p. 2.

27 NETHERLANDS—PORTUGAL. Signed agreement concerning reciprocal recognition of regulations concerning lifesaving apparatus on board ship. *U. S. Daily*, Oct. 24, 1928, p. 2.

28/*July 2* BELGIUM—GREAT BRITAIN. Exchanged notes on extension of extradition treaty of Aug. 8, 1923, to certain British and Belgian mandated territories. *G. B. Treaty Series*, no. 20 (1928), *Cmd.* 3203.

29 CUBA—MEXICO. Signed agreement on exchange of radiotelegraphic correspondence. *P. A. U.*, Oct., 1928, p. 1046.

July, 1928

13 BOLIVIA—PARAGUAY. Conference to adjust Gran Chaco boundary dispute adjourned after signing document setting forth reasons of the two delegations for refusing to make concessions. *C. S. Monitor*, July 14, 1928, p. 2. Review of dispute in *N. Y. Times*, Oct. 7, 1928. *Fortnightly summary*, Nov. 1, 1928, p. 2.

19 HONDURAS—UNITED STATES. Exchanged ratifications of treaty of friendship signed Dec. 7, 1927. *P. A. U.*, Nov., 1928, p. 1148.

24 FRANCE—TUNIS. Reciprocal agreement entered into for entry into each country duty-free of certain products of the other. *U. S. C. R.*, Sept. 24, 1928, p. 810.

26 GERMANY—GREAT BRITAIN. Signed agreement relating to surplus of German property in China. *G. B. Treaty Series*, no. 21 (1928), *Cmd.* 3204.

28 PERUVIAN INSTITUTE OF INTERNATIONAL LAW. Organization announced by President of Peru. *B. I. I. I.*, Oct., 1928, p. 337.

29 NETHERLANDS—TURKEY. Commercial treaty extended by exchange of notes. *U. S. Daily*, Oct. 24, 1928, p. 2.

August, 1928

1 FRANCE—GERMANY. Supplementary agreement of June 20, 1928, modifying certain provisions of commercial treaty of Aug. 17, 1927, came into force. *U. S. C. R.*, Dec. 3, 1928, p. 644.

2 WAR CLAIMS ARBITER. Announced total of 1,181 claims filed, prior to Aug. 2, including 1000 covering patents and 100 involving ships. *U. S. Daily*, Aug. 17, 1928, p. 1.

9 CANADA—YUGOSLAVIA. Most-favored-nation commercial agreement came into force. *U. S. C. R.*, Sept. 24, 1928, p. 810.

9–16 INTERNATIONAL LAW ASSOCIATION. Held 35th annual conference in Warsaw. Accepted provisionally invitation of American Branch to meet in New York in 1930. Session may be held in Spain in 1929. *Times* (London), Aug. 10, 13, 16, 1928, pp. 11–12. *Jour. Int. Chamber of Commerce*, Oct. 1928.

10 GREECE—SPAIN. Exchanged ratifications of consular treaty of navigation, civil and commercial rights, signed in Athens Sept. 23, 1926. *U. S. C. R.*, Oct. 29, 1928, p. 321.

11 FINLAND—SPAIN. Agreement signed modifying commercial treaty of July 16, 1925. *U. S. C. R.*, Nov. 26, 1928, p. 581.

12–19 GENEVA INSTITUTE OF INTERNATIONAL RELATIONS. Held fifth session with attendance of over 300 students. *L. N. News*, Sept. 1928, p. 11.

16 AUSTRIA—UNITED STATES. Signed separate arbitration and conciliation treaties in Washington. *U. S. Daily*, Aug. 17, 1928, p. 1.

16 CHINA—CUBA. Nationalist government of China recognized by Cuba. *B. I. N.*, Sept. 1, 1928.

16 CZECHOSLOVAKIA—UNITED STATES. Signed separate arbitration and conciliation treaties in Washington. *U. S. Daily*, Aug. 17, 1928, p. 1.

16 POLAND—UNITED STATES. Signed separate arbitration and conciliation treaties in Washington. *U. S. Daily*, Aug. 17, 1928, p. 1.

17 BELGIAN-LUXEMBURG ECONOMIC UNION—LITHUANIA. Signed provisional most-favored-nation commercial and navigation agreement. *U. S. C. R.*, Oct. 22, 1928, p. 258.

17 CHINA—GERMANY. Signed most-favored-nation commercial treaty. *U. S. C. R.*, Sept. 3, 1928, p. 631. *U. S. Daily*, Aug. 24, 1928, p. 4. *Europe*, Sept. 1, 1928, p. 1197.

20–27 RUSSIA—LEAGUE OF NATIONS. Exchanged correspondence relative to disarmament. *Soviet Union Review*, Oct. 1928, p. 149.

21 FINLAND—ITALY. Signed treaty of arbitration and conciliation at Helsingfors and two agreements regarding passports and civil procedure respectively. *B. I. N.*, Sept. 1, 1928.

21–28 INSTITUTE OF INTERNATIONAL LAW. Held 35th session in Stockholm. New members elected. *Friedenswarte*, Oct.–Nov., 1928, p. 315. This JOURNAL, Oct., 1928, p. 844.

22 DENMARK—GREECE. Signed most-favored-nation commercial treaty providing for arbitration of all disputes. *B. I. N.*, Sept. 1, 1928. *U. S. C. R.*, Oct. 1, 1928.

22 INTERPARLIAMENTARY UNION. Opened 25th conference in Berlin. *Times* (London), Aug. 24, 1928, p. 11. *Interparliamentary Bulletin*, July–Aug., 1928.

27 GENERAL PACT FOR THE RENUNCIATION OF WAR. Treaty signed in Paris on Aug. 27 by fifteen nations. Text of notes exchanged between the United States and other governments. Note addressed to 48 nations inviting adherence to the Pact, with replies received by Sept. 12, 1928. *International Conciliation*, Oct., 1928, no. 243. List of states adhering: *F. P. A. I. S.*, Nov. 9, 1928, p. 380.

27 *to September* 7 HUNGARY—RUMANIA. Memorandum sent to League Council on Aug. 27 by Hungary stating that negotiations for friendly agreement of optants dispute had been unsuccessful. *Times* (London), Aug. 29, 1928, p. 11. On Sept. 7 Hungary sent note to Rumania replying to Rumanian note of Aug. 29. Summary: *Times* (London), Sept. 10, 1928, p. 11.

28 PERSIA—SWITZERLAND. Signed provisional commercial agreement. *U. S. C. R.*, Dec. 3, 1928, p. 644.

30 *to September* 26 LEAGUE OF NATIONS COUNCIL. Held 51st session from Aug. 30 to Sept. 8 and 52d session from Sept. 12–Sept. 26; devoted to preparing Assembly discussions on measures to give effect to its decisions. Advised Lithuania and Poland to settle Vilna dispute by direct negotiation. *L. N. M. S.*, Oct. 15, 1928.

31 BULGARIA—TURKEY. Exchanged ratifications of most-favored-nation treaty of commerce and navigation signed Feb. 12, 1928. *U. S. C. R.*, Oct. 22, 1928, p. 258.

31 MINORITIES CONGRESS. Fourth European minorities congress closed. *B. I. N.*, Sept. 15, 1928, p. 19.

September, 1928

1 CANADA—ESTONIA. Most-favored-nation commercial agreement came into force. *U. S. C. R.*, Sept. 24, 1928, p. 810.

1 GERMANY—UNION OF SOUTH AFRICA. Signed treaty of commerce and navigation. *Times* (London), Sept. 4, 1928, p. 11. *U. S. C. R.*, Oct. 15, 1928, p. 191.

3 JAPAN—LATVIA. Most-favored-nation treaty of July 4, 1928, came into force. *U. S. C. R.*, Oct. 22, 1928, p. 258.

3–26 LEAGUE OF NATIONS ASSEMBLY. Held ninth ordinary session with delegates from fifty states. M. Herluf Zahle (Denmark) elected President. Spain, Persia, and Venezuela were elected to succeed China, the Netherlands and Cuba as non-permanent members of Council. Charles Evans Hughes was elected to succeed John Bassett Moore as judge of the Permanent Court of International Justice. Adopted resolutions on international arbitration, pacific settlement of international disputes, good offices of the Council, model treaties of non-aggression and mutual assistance, optional clause of Art. 36 of Statute of the Court, survey of international arbitration conventions, model treaty to prevent war, financial assistance to states, arms traffic, codification of international law, etc. *L. N. M. S.*, Oct. 15, 1928. *L. N. Assembly Journal*, Sept. 3–26, 1928.

8 DENMARK—PERSIA. Provisional agreement arranged by exchange of notes regulating judicial status of subjects of both countries and providing most-favored-nation treatment for their products. *U. S. C. R.*, Oct. 29, 1928, p. 321.

8 HUGHES, CHARLES E. Elected judge of Permanent Court of International Justice by unanimous vote of League Council and 41 to 48 votes in Assembly. *N. Y. Times*, Sept. 9, 1928, p. 1. *Times* (London), Sept. 10, 1928, p. 12.

8 NETHERLANDS—UNITED STATES. Signed agreement extending time for appointment of Commission under Art. II of treaty of Dec. 18, 1913. Text: *U. S. Treaty Series*, no. 760–A.

10–22 INTERNATIONAL TELEGRAPH CONFERENCE. Met in Brussels, under auspices of International Telegraph Union. *N. Y. Times*, Sept. 15, 1928, p. 6. *Journal Télégraphique*, Oct., 1928, p. 210. Protocol signed on Sept. 22 making certain changes in the regulations annexed to St. Petersburg convention. Text: *U. S. Daily*, Oct. 20, 1928, p. 2. Report of U. S. delegation made public on Oct. 25. *U. S. Daily*, Oct. 26, 1928, p. 1.

11 MOZAMBIQUE—UNION OF SOUTH AFRICA. Signed convention at Pretoria, assuring mutual most-favored-nation treatment, etc. *U. S. C. R.*, Nov. 19, 1928, p. 512.

11 PORTUGAL—UNION OF SOUTH AFRICA. Signed new Mozambique convention, authorizing recruitment of native labor in Mozambique in gold and coal mining industries. *B. I. N.*, Sept. 29, 1928.

13 ALBANIA—UNITED STATES. Recognition of new constitutional monarchy by the United States announced. *U. S. Daily*, Sept. 14, 1928, p. 1.

13 PERMANENT COURT OF INTERNATIONAL JUSTICE. Judgment delivered in Chorzow factory case. Poland should pay compensation to Germany for having taken over nitrate factory in Upper Silesia. *L. N. M. S.*, Oct. 15, 1928, p. 249.

15 CANADA—LITHUANIA. Most-favored-nation commercial treaty came into force. *U. S. C. R.*, Oct. 1, 1928, p. 62.

16 RHINELAND EVACUATION. Agreement reached at Geneva between representatives of Great Britain, France, Germany, Belgium and Japan for appointment of committee of financial experts for complete and definite settlement of reparations problem, and for a Commission of Verification and Conciliation to supervise the demilitarized zone. *Times* (London), Sept. 17, 1928, p. 12.

22/29 NORWAY—SPAIN. Exchanged notes cancelling all conventional rates granted by convention of Oct. 7, 1922, and providing mutual most-favored-nation treatment. *U. S. C. R.*, Nov. 19, 1928, p. 512.

23 GREECE—ITALY. Signed treaty of friendship and conciliation in Rome. *N. Y. Times*, Sept. 24, 1928, p. 6. Text: *E. E. P. S.*, Sept. 15, 1928, p. 16.

24 SWEDEN—TURKEY. Provisional commercial agreement arranged by exchange of notes. *L. N. M. S.*, Nov. 15, 1928, p. 343.

24 *to October* 6 WORLD FUEL CONFERENCE. Held in London under auspices of World Power Conference. United States represented. *Times* (London), Sept. 26, 1928, p. 8.

25 CODIFICATION CONFERENCE. Ninth Assembly of the League "decided that the first Codification Conference should not meet before the beginning of 1930, unless the Disarmament Conference was not held in 1929." In the latter case, the Codification Conference would meet in 1929 at The Hague. *L. N. M. S.*, Oct. 15, 1928, p. 258. *L. N. Assembly Journal*, Sept. 25, 1928, p. 348.

25 LITHUANIA—RUSSIA. Signed provisional most-favored-nation commercial treaty. *B. I. N.*, Sept. 29, 1928.

26 GREAT BRITAIN—PANAMA. Signed commercial travelers treaty in Panama. *U. S. C. R.*, Nov. 12, 1928, p. 451.

27 CANADA—UNITED STATES. Agreement announced for mutual exemption of steamship companies from municipal income taxes. *U. S. Daily*, Sept. 28, 1928, p. 1.

28 CANADA—PORTUGAL. Proclamation issued bringing most-favored-nation treaty into force on Oct. 1. *U. S. C. R.*, Oct. 22, 1928, p. 258.

28 *to November* 7 FRANCO-BRITISH NAVAL AGREEMENT. Identic notes delivered to Foreign Offices in London and Paris in which United States Government rejected agreement as basis for discussion of naval limitation. Text: *U. S. Daily*, Sept. 29, 1928, p. 1. *Cur. Hist.*, Nov., 1928, *29:* 308. Copies of correspondence between Paris and London Foreign Offices on the subject of naval limitation dating back to March, 1928, handed to American *chargé d'affaires* in Paris on Sept. 29. *N. Y. Times*, Sept. 30, 1928, p. 1. French blue book and British white paper published on Oct. 22 giving correspondence exchanged, instructions sent to envoys and other correspondence on the Franco-British naval limitation understanding. Text of agreement: *N. Y. Times*, Oct. 23, 1928, p. 1, 22. *G. B. Misc. Series*, no. 6 (1928), *Cmd.* 3211. Japan published its reply to British note on Oct. 22 and Italy published "green book" on Oct. 25. *B. I. N.*, Oct. 27–Nov. 10, 1928. During discussion in British Parliament on Nov. 7, Lord Cushendun replied to Lord Thompson's criticisms by stating that the agreement was at an end. Viscount Grey and Lord Cecil also made speeches. Text: *Times* (London), Nov. 8, 1928, p. 8.

October, 1928

1/9 CHINA—FRANCE. Terms of settlement in connection with Nanking incident of Mar. 24, 1927, arranged by exchange of notes. *North China Herald*, Oct. 20, 1928, p. 81. Text: *E. E. P. S.*, Oct. 15–30, 1928, p. 142.

1–6 WIRELESS TELEGRAPH CONFERENCE. Held in Rome. *Europe*, Nov. 10, 1928, p. 1549.

4 CHINA CONSTITUTION. Organic law of Nationalist government promulgated by Kuomintang (Nationalist Party). *Times* (London), Oct. 6, 1928, p. 11. *China Weekly Review*, Oct. 13, 1928, p. 224.

6 COSTA RICA—PANAMA. Resumption of diplomatic relations announced. *U. S. Daily*, Oct. 9, 1928, p. 3.

6 ITALY—SPAIN. Signed treaty in Madrid for establishment of regular air lines between the two countries; also protocol to Italian-Spanish aërial navigation treaty of 1927. *B. I. N.*, Oct. 13, 1928.

8 CHINA—ITALY. Terms of settlement of Nanking incident of March 24, 1927, arranged by exchange of notes. Text: *North China Herald*, Oct. 20, 1928, p. 81.

9 CHINA. General Chiang-Kai-shek elected President of the Nationalist government of China. *Cur. Hist.*, Nov., 1928, *29:* 350.

9 NARCOTICS. Announced that an international agreement for detection of smuggling of narcotics has been completed by the United States with eleven other countries. List of countries signatory to agreement: *C. S. Monitor*, Oct. 9, 1928, p. 1.

10 TACNA ARICA. Work of Boundary Commission suspended for four months in order to give time to permit negotiations for direct settlement of dispute by Chile and Peru. Settlement forecast within four months by Secretary Kellogg. *U. S. Daily*, Oct. 11–12, 1928, pp. 1. and 3.

11 GREECE—YUGOSLAVIA. Text of agreement made public regarding protocols sent to Serbia by Greece on June 1, 1926, dealing with transport from free zone to Yugoslavia. *Times* (London), Oct. 15, 1928, p. 15. Text: *E. E. P. S.*, Oct. 15–31, 1928, p. 135.

12 BELGIAN-LUXEMBURG ECONOMIC UNION—TURKEY. Exchanged ratifications of most-favored-nation commercial treaty. *U. S. C. R.*, Nov. 26, p. 581.

12 BELGIUM—TURKEY. Exchanged ratifications of treaty of commerce and navigation signed Aug. 29, 1927. *B. I. N.*, Oct. 27, 1928.

16 POSTAL UNION CONGRESS. Preparatory conference held in Paris to arrange for International Postal Union Congress in London, 1929. *B. I. N.*, Oct. 27, 1928, p. 22.

18 NICARAGUA CLAIMS COMMISSION. Announcement of temporary suspension by decree of Congress of Nicaragua, and extension of time during which claims for damages during revolutionary disturbances may be made. Text: *U. S. Daily*, Oct. 18, 1928, p. 1.

19 CHINA—JAPAN. Conference on treaty and tariff questions opened in Nanking. *North China Herald*, Oct. 27, 1928, p. 125. *F. P. A. News B.*, Nov. 30, 1928.

19 GERMAN REPARATIONS. Conference held in Paris between S. P. Gilbert, agent-general of reparations, M. Poincaré and Mr. Churchill on arrangements for committee of experts for revision of Dawes plan in fulfillment of Geneva agreement of Sept. 16, 1928. *Times* (London), Oct. 20, 1928, p. 12. Outline of plans: *N. Y. Times*, Oct. 22, 1928, p. 1. Attitude of State Department: *U. S. Daily*, Oct. 23, 1928, p. 7. German Government announced decision to set up an independent commission of experts. *N. Y. Times*, Oct. 27, 1928, p. 3. On Oct. 30, Germany proposed that committee of experts should consist of financiers of international standing, untrammeled by official instructions. *Times* (London), Oct. 31, 1928, p. 14. *New Republic*, Oct. 31, 1928, p. 290.

19 GERMANY—YUGOSLAVIA. Signed agreement supplementing commercial treaty of Oct. 6, 1927. *U. S. C. R.*, Nov. 26, 1928, p. 582.

20 EXTRATERRITORIALITY IN CHINA. Announced that draft of proposed treaty seeking relinquishment of extraterritoriality had been sent to Belgium, Spain, Denmark, and Portugal. *N. Y. Times*, Oct. 21, 1928, p. 4.

22 ALBANIA—UNITED STATES. Signed arbitration and conciliation treaties. *U. S. Daily*, Oct. 23, 1928, p. 3.

22–31 DOUBLE TAXATION CONFERENCE. Opened in Geneva with 28 countries represented. Four draft conventions were submitted to subcommittees. *N. Y. Times*, Oct. 23, 1928, p. 13. Summary of conference: *U. S. Daily*, Nov. 8, 1928, p. 3. *L. N. M. S.*, Nov. 15, 1928, p. 349.

22–28 INTELLECTUAL WORKERS. First session of Advisory committee of intellectual workers held at International Labor Office. *I. L. O. M. S.*, Nov., 1928.

23 GERMANY—GREECE. Exchanged ratifications of commercial treaty of Mar. 24, 1928. *U. S. C. R.*, Dec. 3, 1928, p. 644.

23 RUSSIAN BONDHOLDERS. International committee for protection of Russian bondholders held first meeting in London. *B. I. N.*, Oct. 27, 1928. *F. P. A. News B.*, Nov. 9, 1928.

24 GERMANY—SIAM. Most-favored-nation treaty of friendship, commerce and navigation signed at Bangkok on April 7, 1928, came into force. *U. S. C. R.*, Nov. 26, 1928, p. 582. Text: *E. E. P. S.*, Sept. 15, 1928, p. 1357.

24 ITALY—SWITZERLAND. Agreement on subject of frontier traffic regulations signed. *B. I. N.*, Nov. 10, 1928.

25 ARGENTINA—GREAT BRITAIN. Exchange of notes announced respecting British land claims in South Orkney, South Georgia and Falkland Islands. *N. Y. Times*, Oct. 26, 1928, p. 4.

25 BELGIUM—POLAND. Signed treaty of arbitration and conciliation in Brussels. *B. I. N.*, Nov. 10, 1928.

26 LEAGUE OF NATIONS MANDATES COMMISSION. Held 14th session to consider various mandate reports and general questions on economic equality, liquor traffic and public health. *L. N. M. S.*, Nov. 15, 1928, p. 358.

27 SWEDEN—UNITED STATES. Signed arbitration treaty. *U. S. Daily*, Oct. 29, 1928, p. 3. *Press notice*, Oct. 27, 1928.

30 CANADA—CZECHOSLOVAKIA. Exchanged ratifications of most-favored-nation commercial agreement signed Mar. 15, 1928. *U. S. C. R.*, Nov. 26, 1928, p. 581.

30 EGYPT. Addressed note to representatives of capitulatory Powers on subject of capitulations. *B. I. N.*, Nov. 10, 1928.

30 GERMANY—LITHUANIA. Signed trade and shipping treaty to supersede provisional tariff agreement of 1923. *Times* (London), Nov. 1, 1928, p. 13.

November, 1928

1 ALBANIA—FRANCE. Exchanged ratifications of consular convention. *B. I. N.*, Nov. 10, 1928.

4 CZECHOSLOVAKIA—GERMANY. Agreement initialed in Berlin regarding free zone at Hamburg. *B. I. N.*, Nov. 10, 1928.

4 NICARAGUA ELECTION. General Moncada of the Liberals was chosen President in election supervised by National Board of Elections, composed of Gen. Frank McCoy, U. S. A., and representatives of the Nicaraguan liberal and conservative parties. *U. S. Daily*, Nov. 15, 1928, p. 2. *Cur. Hist.*, Dec. 1928, *29:* 486.

5 FRANCE—GREECE. Commercial treaty of Sept. 8, 1926, extended by exchange of notes on Sept. 12, came into force in France. *J. O.*, Nov. 16, 1928, p. 12127.

9 ITALY—SWITZERLAND. Swiss government published text of exchange of notes concerning dispute over arrest of Signor Rossi, an opponent of the Fascist régime. *B. I. N.*, Nov. 24, 1928.

10 GERMANY—RUMANIA. Signed agreement for stabilization of Rumanian currency. *Times* (London), Nov. 12, 1928, p. 15.

12 PERMANENT COURT OF INTERNATIONAL JUSTICE. Opened extraordinary session to consider case between France and Yugoslavia concerning Serbian loans. *L. N. M. S.*, Nov. 15, 1928, p. 360.

13 CHINA—NORWAY. Signed treaty giving tariff autonomy to China. *B. I. N.*, Nov. 24, 1928.

14 LITHUANIA—UNITED STATES. Signed arbitration and conciliation treaties. *U. S. Daily*, Nov. 15, 1928, p. 2. *Press notice*, Nov. 14, 1928.

15 BRAZIL—COLOMBIA. Signed treaty ensuring Brazil her "traditional frontier over the line Apaporis Tabatinga" and allowing Colombia free navigation on the Amazon, Caqueta and Putumayo rivers. *B. I. N.*, Nov. 24, 1928.

INTERNATIONAL CONVENTIONS

ARBITRATION CLAUSES. Protocol. Geneva, Sept. 24, 1923.
Ratifications deposited:
France. June 7, 1928. *J. O.*, July 24, 1928, p. 8215.
Japan. July 4, 1928.
Signature: Estonia. July 2, 1928. *L. N. O. J.*, Aug., 1928.

CUSTOMS DOCUMENTS. Santiago, May 3, 1923.
Ratification deposited: Uruguay. April 18, 1928. *P. A. U.*, Oct., 1928, p. 1047.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Ratification: Finland. May 23, 1928.
Signature: Chile. June 14, 1928. *L. N. O. J.*, Aug., 1928.

EIGHT HOUR DAY. Washington, Nov. 28, 1919.
Ratifications:
Luxemburg. Apr. 16, 1928. *L. N. O. J.*, June, 1928, p. 775.
Portugal. July 3, 1928. *I. L. O. B.*, July 31, 1928, *L. N. O. J.*, Sept., 1928.

ELECTRICAL COMMUNICATIONS UNION. Mexico City, July 21, 1924.
Ratification: Dominican Republic. May 26, 1928. *P. A. U.*, Oct., 1928, p. 1046.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov., 16, 1921.
Ratifications:
Belgium. April 30, 1928. *I. L. O. B.*, July 31, 1928, p. 110.
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 776.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.
Ratifications:
Cuba. Aug. 6, 1928.
Netherlands. July 21, 1928. *L. N. O. J.*, Sept., 1928.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.
Ratifications:
Cuba. May 30, 1928. *I. L. O. B.*, July 31, 1928, p. 111.
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 776.

FOREIGN ARBITRAL AWARDS. Geneva, Sept. 26, 1927.
Signatures:
Estonia. July 9, 1928.
Germany. June 6, 1928.
Netherlands. June 7, 1928. *L. N. O. J.*, Aug., 1928.

GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Art. 393. Geneva, Nov. 2, 1922.
Ratifications:
Chile. Aug. 23, 1928.
Persia. Aug. 14, 1928. *L. N. O. J.*, Sept., 1928.

INSPECTION OF EMIGRANTS. Geneva, June 5, 1926.
Ratifications:
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 777.
Czechoslovakia. Mar. 29, 1928. *I. L. O. B.*, July 31, 1928.

LEAGUE OF NATIONS COVENANT. Protocols of Amendment. Oct. 5, 1921 (Art. 4).
Ratification: Chile. Aug. 1, 1928. *L. N. O. J.*, Sept., 1928.

LEAGUE OF NATIONS COVENANT. Protocols of Amendment. Oct. 5, 1921: Art. 6, last paragraph, Articles 12, 13, 15; Art. 16, first and second paragraphs to be inserted; Art. 26, first paragraph and adding new paragraph, second paragraph; Sept. 21, 1925: Art. 16, second paragraph of original text.
Ratification:
Chile. Aug. 1, 1928. *L. N. O. J.*, Sept., 1928.

LIBERAL PROFESSIONS. Montevideo, Feb. 4, 1889.
Adhesion: Ecuador. May 22, 1928. *P. A. U.*, Oct., 1928, p. 1046.

MARITIME PORTS RÉGIME. Convention and Statute. Geneva, Dec. 9, 1923.
Ratifications:
Germany. May 1, 1928. *L. N. O. J.*, June, 1928, p. 773.
Norway. June 21, 1928. *L. N. O. J.*, Aug., 1928, p. 1139.

MATERNITY CONVENTION. Washington, Nov. 29, 1919.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.
Ratification deposited: Uruguay. April 18, 1928. *P. A. U.*, Oct., 1928, p. 1047.

NIGHT WORK IN BAKERIES. Geneva, June 8, 1925.
Ratifications:
Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.
Finland. May 11, 1928. *I. L. O. B.*, July 31, 1928.
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 777.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

OPIUM CONVENTION. Geneva, Feb. 11, 1925.
Ratification deposited: Japan. *U. S. Daily*, Oct. 24, 1928, p. 1.

OPIUM CONVENTION. *Geneva.* Feb. 19, 1925.
Promulgation: France. Oct. 31, 1928. *J. O.*, Nov. 8, 1928, p. 11838.
Ratifications:
Canada. June 27, 1928.
Netherlands. June 4, 1928.
Spain. June 22, 1928. *L. N. O. J.*, Aug., 1928, p. 1139.
Rumania. May 18, 1928. *L. N. O. J.*, June, 1928, p. 773.
Japan. *U. S. Daily*, Oct. 24, 1928, p. 1.
Dominican Republic. July 19, 1928. *L. N. O. J.*, Sept., 1928, p. 1353.

PAN AMERICAN ARBITRATION. Santiago, May 3, 1923.
Ratifications deposited:
Uruguay. April 18, 1928. *P. A. U.*, Oct., 1928, p. 1047.
Costa Rica. *U. S. Daily*, Oct. 23, 1928, p. 1.

PAN AMERICAN ARBITRATION TREATY. Santiago, May 3, 1923.
Ratifications:
Dominican Republic. Nov. 24, 1928. *U. S. Daily*, Nov. 28, 1928, p. 2.
Colombia. *U. S. Daily*, Nov. 12, 1928, p. 1.
Salvador. July 20, 1928. *P. A. U.*, Nov., 1928, p. 1149.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924. Additional protocol. Lima, Oct. 19, 1927.
Ratifications deposited: United States. July 3, 1928. *U. S. Treaty Series*, no. 763.

PARCEL POST CONVENTION. Mexico, Nov. 9, 1927.
Ratifications:
Bolivia.
Colombia. *U. S. Daily*, Dec. 3, 1928, p. 2.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional Clause.
Signatures:
Estonia (renewal). *L. N. O. J.*, Aug., 1928.
Hungary. Sept. 14, 1928.
Spain. Sept. 21, 1928. *L. N. M. S.*, Oct. 15, 1928.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of Signature. Geneva, Dec. 16, 1920.
Ratification deposited: Chile. July 20, 1928. *L. N. M. S.*, Sept. 15, 1928, p. 216.

POSTAL CONVENTION. Buenos Aires, Sept. 15, 1921.
Ratification: Haiti. July 12, 1928. *P. A. U.*, Nov., 1928, p. 1148.

PRIVATE LAW CODE. Havana, Feb. 20, 1928.
Ratifications: Cuba and Panama. *P. A. U.*, Nov., 1928, p. 1141.

RADIOTELEGRAPH CONVENTION. Washington, Nov. 25, 1927.
Ratification deposited: Denmark. *Press notice*, Nov. 15, 1928.
Ratifications:
Canada. Oct. 29, 1928.
Netherlands (including Dutch East Indies, Surinam and Curaçao).
Norway. *U. S. Daily*, Oct. 30, 1928, p. 2. *Press notice*, Oct. 29, 1928.

RELIEF UNION. Geneva, July 12, 1927.
Ratifications:
Ecuador. July 30, 1928.
Egypt. Aug. 7, 1928.
Italy. Aug. 2, 1928. *L. N. O. J.*, Sept., 1928.

RENUNCIATION OF WAR. Paris, Aug. 27, 1928. Signatures and text: *International Conciliation*, Oct., 1928, no. 243.

REPATRIATION OF SEAMEN. Geneva, June 23, 1926.
Ratifications:
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 777.
Cuba. May 30, 1928.
Estonia. May 24, 1928. *I. L. O. B.*, July 31, 1928, p. 111.

SANITARY CONVENTION. Paris, Jan. 17, 1912. Revision. Paris, June 21, 1926.
Ratification: Russia. *Soviet Union Review*, Oct., 1928, p. 153.
Ratification deposited: Great Britain. Mar. 10, 1928. *G. B. Treaty Series*, no. 22, 1928.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926. *Accession (ad referendum):* Dominican Republic. July 16, 1928.
Ratifications:
Canada. Aug. 6, 1928.
Italy. Aug. 25, 1928. *L. N. O. J.* Sept. 1928.

TANGIER CONVENTION. Paris, Dec. 18, 1923. Amendment. Paris, July 25, 1928.
Text of final protocol: *G. B. Treaty Series*, no. 25 (1928), *Cmd.* 3216.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Genoa, July 9, 1920.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratifications:
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 776.
Portugal. June 15, 1928. *I. L. O. B.*, July 31, 1928.

WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Ratifications:
Cuba. May 30, 1928. *I. L. O. B.*, July 31, 1928, p. 111.
Luxemburg. April 16, 1928. *L. N. O. J.*, June, 1928, p. 776.

WINE BUREAU. Paris, Nov. 29, 1924.
Came into force. Oct. 29, 1927. Text: *C. S. Monitor*, Nov. 3, 1928, p. 3.

WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.
Ratification: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

WORKMEN'S COMPENSATION FOR ACCIDENTS (Equality of Treatment). Geneva, June 5, 1925.

Ratifications: Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

WORKMEN'S COMPENSATION FOR OCCUPATIONAL DISEASES. Geneva, June 10, 1925.

Ratifications:

Cuba. Aug. 6, 1928. *L. N. O. J.*, Sept., 1928.

Netherlands. Nov. 7, 1928. *B. I. N.*, Nov. 24, 1928.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

COURT OF APPEAL OF PARIS

(10TH CORRECTIONAL CHAMBER)

BIGELOW *v.* PRINCESS ZIZIANOFF *et al.*[1]

January 28, 1928

The government alone is qualified to interpret diplomatic conventions, and especially to give its opinion on the subject of the meaning proper to be given to the provisions of the convention of February 23, 1853, between France and the United States, especially to the terms "personal immunity" concerning consular agents.

And if the French Government has decided that this expression should be extended, not to immunity from territorial jurisdiction in criminal matters, but only to exemption from preliminary arrest and detention, this interpretation of the 1853 convention (which has not been modified or denounced) is obligatory upon the courts by reason of the principle of the separation of powers.

Consequently, the French courts have jurisdiction over a consul of the United States of America prosecuted in France, not for refusal of a passport, which would be an act in his consular capacity and would consequently be outside any consideration by the judicial authority, but only for having made defamatory comments on the subject of this refusal in communicating the decision to representatives of the press of his country, comments which were not a necessary and indispensable corollary thereto.

President, M. FORTIN

Mr. Bigelow, director of the Passport Service at the American Consulate General in Paris, has appealed from the judgment of the Correctional Tribunal of the Seine (12th Chamber) of April 5, 1927, which declared itself competent in a prosecution of him for defamation.[2]

Attorney General Reynaud submitted the following conclusions:

Gentlemen,

I. Princess Zizianoff, who had requested a visa of her passport in order to go to the United States, met with a refusal by the consulate, against which she had protested. Consul Bigelow, in order to explain the decision of his government, had, in the course of an interview in his office, furnished representatives of the press information concerning Princess Zizianoff which was reproduced in an American newspaper placed on sale in Paris, the *Boston Sunday Post*, where may be read in the issue of September 5, 1926, under the signature Robert Johnson, an article of which the essential sentences are as follows:

> Did Beauty Spy on U. S.? Princess Zizianoff is an international spy. She worked for the Germans in Russia during the World War and was deported to Siberia when she was caught. She was sent to

[1] Translated from *Gazette du Palais*, May 4, 1928 (No. 125).
[2] Printed in this JOURNAL, Vol. 21 (1927), p. 811.

> America by Zinovieff last year to do espionage work among the American patriotic organizations, and her anti-Bolshevik activity was only a blind. In the past week she has twice secretly visited the Soviet embassy in Paris.

In consequence of this article, Princess Zizianoff cited before the 12th Correctional Tribunal of the Seine for abusive language and libel Mr. Kahn, Paris representative of the said newspaper, two other collaborators, and also Mr. Bigelow, the latter as an accomplice, for having furnished the elements of the article.

Mr. Bigelow, having denied the competence of the French court, was overruled by the court, which declared itself competent in respect to him.

Appeal was entered against this judgment.

Two arguments are invoked in support of the contention of incompetence:

The first is drawn from the text of the convention of February 23, 1853, between France and the United States.

The second is based upon the general principles of public law and international law, which prohibit, even in the absence of any convention, citing a foreign consul before the courts of the country where he performs his duties for acts done in the performance of those duties.

II. On the first point the defense maintains that French tribunals have no jurisdiction over consuls of the United States both by reason of the provisions of the Consular Convention of February 23, 1853, between France and the United States, and those of the Consular Convention of January 7, 1876, between France and Greece, applicable to consuls of the United States in virtue of the most-favored-nation clause in the former convention.

The convention with the United States is in these terms:

> The consuls-general, consuls, vice-consuls or consular agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime. . . . If, however, the said consuls-general, consuls, vice-consuls or consular agents, are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted to commercial agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants.

The expression "personal immunity" should be understood in the sense of general immunity from jurisdiction, and this rule of immunity from jurisdiction is to be found repeated and made definite in the text of the convention of January 7, 1876, between France and Greece as follows:

> Consuls-general, consuls, student consuls, chancellors, and vice-consuls, or consular pupils, if citizens of the state appointing them, shall enjoy personal immunity; they cannot be arrested or imprisoned except for actions which the penal legislation of the country of their residence defines as crimes and punishes as such; if they are in business, physical constraint can be applied to them only for acts done in business.

This exemption from arrest and imprisonment would have as its indispensable corollary immunity from jurisdiction, for it would be inconceivable that the judiciary should be limited to delivering purely theoretical sentences whose execution would be legally impossible. The French courts would therefore be under the obligation of declaring themselves incompetent save in case of crime, limiting themselves to applying provisions whose definiteness and clearness preclude any controversy. And thus no question would be raised against the uncontested principle that courts can in no case decide, from the international legal point of view, the meaning or scope of international conventions. There would be here no construction or interpretation, but a mere application of a distinct rule.

This first line of argument cannot be accepted. In public law it belongs to each state to interpret international conventions and its interpretation is final for courts under its sovereignty. A French court is bound by the sovereign opinion of the state in the name of which it renders justice. This opinion is a categorical command for the judge. The principle of the separation of powers requires it so.

Now, the French Government has made known its opinion in the case of the prosecution of Consul King, of the United States, and this opinion is to be found in a judgment of the Criminal Chamber of the Court of Cassation of February 23, 1912 (*Gaz. Pal.* 1912. 1. 454—*Bull. crim.* n. 111, p. 189). It is summed up in this brief formula: "The personal immunity granted to consuls by the convention does not exclude the competence of our courts in penal matters," and the letter addressed by the Minister of Foreign Affairs on October 26, 1926, to Me Thomas Olivera, *huissier* at Paris, confirms this doctrine by referring to the above-mentioned judgment.

This interpretation of the 1853 convention, to which the French courts ought to conform, is moreover the most reasonable one, and the arguments of the opposing thesis are by no means decisive. The expression "personal immunity" has different meanings, and to give it the meaning of immunity from jurisdiction would be an arbitrary assertion.

The exemption from arrest and imprisonment contemplated by the convention between France and Greece has to do in a general way in treaties only with preliminary detention. Thus it is in the consular convention of November 19/December 2, 1902, between the United States and Greece (*Rec. intern. des traités du XXe Siècle*, p. 346), which mentions "preliminary arrest," and in the convention of August 21, 1911, between Belgium and Bolivia (*Rev. de droit internat. pr. et public*, 1913, p. 612), which provides for the case of persons preliminarily arrested.

The provision which would prohibit the arrest of a consul in virtue of a judgment would, moreover, be illusory, for the government of the state where the foreign consul resides would undoubtedly have the right, by reason of the conviction, to withdraw the exequatur from such consul and

treat him thereafter as a mere individual in order to subject him to the penalty pronounced upon him.

On the other hand, a singular contradiction appears in the plan of the defense: It is argued at first that the convention of 1853, being clear and precise, the courts do not have to interpret it, which is evidently not within their jurisdiction, but that they have the undoubted right to apply it, and thereafter that a disagreement exists between the French Government and the Government of the United States with regard to the meaning and scope of the convention as to what concerns jurisdiction over consuls.

The proof that the provision lacks clearness and precision results from the disagreement itself. And in case of disagreement, the French Government alone is qualified to interpret, without being otherwise bound by the contrary opinion of a co-contracting state, which can denounce a treaty whose application is not in conformity with its own views. Contrary to an ill-founded claim of the defense, the interpretation of a consular convention has no need of being bilateral. So the court will not take time, as the tribunal did, in attempting to establish that the two governments were in agreement on the principle, since the existence of this agreement is not necessary.

It is objected finally that neither the decision of the Court of Cassation of February 23, 1912 (the King Case) nor of the Minister of Foreign Affairs, whose interpretation is quoted in that decision, fixes the status of the Franco-Grecian convention of January 7, 1876, by which the consuls of the United States should benefit in virtue of the most-favored-nation clause in the convention of 1853 between France and the United States.

But this silence is easily explained and we have in advance answered this observation by remarking that the arrest and imprisonment of consuls which the Franco-Grecian convention prohibits should be understood in the sense of preliminary detention. The convention does not at all grant to consuls immunity from jurisdiction, and it adds absolutely nothing to the provisions of that which was concluded in 1853 between France and the United States.

III. The second argument, called subsidiary in the pleadings, should likewise be rejected.

A consul, the defense tells us, cannot be prosecuted even in the absence of any diplomatic convention before the judicial tribunals for acts done in his official capacity, nor even for misdeeds committed in the exercise of his functions. Now Mr. Bigelow was well within his functions when he explained the reasons which had led his government to refuse the visa requested by Princess Zizianoff. It is even added that he was performing an act proper to his functions when in his office, being charged with relations with the press, he issued a communiqué or gave an interview. Moreover, that is the opinion which has been stated in this matter by the Government of the United States.

Thus, Gentlemen, the classic question of responsibility of public functionaries is before you. In what case does one find oneself in presence of an official act? In what case, on the other hand, can a personal act involving responsibility of the official before the ordinary tribunals be found? "If the injurious act is impersonal," writes Laferrière, "if it discloses an administrator, a mandatory of the state more or less subject to error, and not man with his feebleness, passions, and imprudences, the act remains administrative and cannot be brought before the courts. If, on the contrary, the personality of the agent is disclosed by acts in violation of law, by violence, or fraud, then the fault is chargeable to the functionary, not to his office. The act loses its administrative character and is no longer an obstacle to judicial cognizance." (Laferrière, *Tr. de juridiction administrative, 2e éd., t. I*, p. 648.)

"A gross mistake," he further says, "manifest usurpation, an inexcusable attack upon private rights, or even a serious fault as opposed to a mere administrative inaccuracy, may justify cognizance by the courts." Conclusions in the Laumonnier-Corrial (*Trib. conflits* 5 *Mai* 1877, D. 78. 3. 13.)

Likewise in M. Gaston Jèze's opinion, there is a personal fault "if the wrong committed consists in a serious error which by reason of his position the functionary should not be excused for having committed:" G. Jèze (*Rev. droit public*, 1909, p. 263, 268 *et suiv.; Les principes généraux du droit administratif, 2e sect.*, p. 59, note 3, *et* p. 60, note 2); Duguit (*Tr. de droit constitutionnel, t. III*, p. 280.)

The criterion therefore should be sought in the element of intent and it is necessary to scrutinize the agent's intentions. Often the personal fault will consist in a sort of deceit, but it is necessary clearly to point out that jurisprudence follows doctrine on this point and does not limit the responsibility of officials to actions that are defined as deceit. There are faults which raise a presumption of deceit, and we often find in decrees the expression "serious fault amounting to deceit."

As M. Berthelemy says, "serious blunders, inexcusable negligence, *committed without malice*, can be deemed to be personal faults."

It is thus that legal analysis permits one to discover, either in external actions or in the official act itself, a circumstance which is detachable either physically or mentally and which will be a constituent of the personal fault. This fault will be found to be isolated from the official act, it will have an existence of its own and will be like a legal entity so that the tribunals can take cognizance of it without having to go into any examination or consideration of official acts.

When it is a matter of external actions discrimination is simple. It is thus that a mayor performs an official act when he causes to be posted at his office a corrected table of the electoral list, even with an indication of the reason for curtailing it. (*Trib. conflits* 26 *juin* 1897, D. 99. 3. 66.) But he commits a personal act, a separate one, when he does not confine himself

to such publicity provided by the instructions received by him and causes it to be announced in the streets that such or such elector has been dropped rightfully from the electoral list because he has become a bankrupt. (*Trib. conflits* 4 *décembre* 1897. D. 99. 3. 93).

Here the act which constitutes the fault, the making public in the street, which no legislative provision or rule provides for or authorizes, is materially distinct from the administrative act which consists in the official publication of the list at the mayor's office.

But it happens also that the act constituting the fault may be included in the official act, as is shown by the two following cases decided in the courts.

A teacher is not responsible for the poor quality of his teaching, nor for literary or historical mistakes, but he commits a personal fault if he delivers himself of anti-militaristic remarks or if he attacks accepted beliefs: (*Trib. conflits* 2 *juin* 1908. D. 1908. 3. 57).

Another example: A mayor has the church bells rung for a civil burial; this act, evidently administrative, may include a personal fault, especially if the step has been taken in the absence of any local usage authorizing it. Such a step is inspired by motives foreign to the desire for good administration, and the intention which is revealed is a circumstance detached from the administrative act. Consequently, the judicial tribunals are competent. (*Trib. conflits* 22 *avril et* 4 *juin* 1909. D. 1911. 3. 41).

Therefore the remarks imputed to Mr. Bigelow, remarks made after the refusal of a visa of the passport of Madam Zizianoff, appear quite materially distinct from the administrative act.

But even admit that they were made in the course of an official consular act, the relations with the press and the response to interviews being considered as essentially official attributions of consular agents. The alleged defamation will be found included in the act, but the personal fault will result from a serious unskillfulness susceptible of injuring private interests, a circumstance clearly detachable from the administrative act. The judgment to be rendered will not require in this case, according to a formula of a decision of the Supreme Court, "either consideration or examination of any administrative act": (*Cass. crim.* 13 *juillet* 1889. D. 90. 1. 330).

The tribunal will limit itself to examining whether the constituted elements of the offences of insult and defamation are found united. The principle of the separation of powers will not be involved.

This appears to be a sound legal view. Moreover, French courts can not be bound by the opinion of the Government of the United States, which thinks that Consul Bigelow has acted within the scope of his duties, and they should apply the principles of French law. Neither the high consideration attaching to the viewpoint of a foreign authority, nor the traditions of the most perfect courtesy can have the consequence of subordinating the decision of our magistrates to this manner of viewing the subject.

In these conditions you will therefore doubtless hold that the jurisdiction

of the Correctional Tribunal of the Seine with regard to Consul Bigelow is certain, and you will confirm the order of the judgment under appeal.

In conformity with the above argument, the court has rendered the following decree:

The Court,

Whereas, the defendant contends that the judges of first instance were in error in declaring themselves competent, on the ground, first, that they placed an incorrect interpretation upon the convention of February 23, 1853, of which Article 2, paragraph 1, conferring personal immunity upon American consular agents, did not permit a valid summons of Mr. Bigelow before the French tribunal, and, secondly, subsidiarily, even if it was proper to interpret the 1853 convention in the sense adopted by the judgment appealed from, Bigelow, having acted in his capacity as consul in the discharge of his duties, could not in any case be subject to the French tribunals for the act he is charged with, and to decide the contrary would be trespass upon the sovereignty of a foreign government;

But, whereas there is no need of deciding upon the principal arguments of Bigelow, the government, which alone is qualified to interpret diplomatic conventions, having previously made known its opinion with regard to the meaning which should be given to the provisions of the convention of February 23, 1853, and especially to the words "personal immunity"; and it appears from a decision of the Court of Cassation of February 23, 1912 (*Bull. crim.* n. 111, p. 189—*Gaz. Pal.* 1912. 1. 454), mentioned in the judgment appealed from, that this sentence concerning consular agents should be understood not as an immunity from personal jurisdiction in criminal matters, but only as an exemption from preliminary arrest and detention; and whereas the convention of 1853 has been neither modified nor denounced, this interpretation is obligatory upon the courts in virtue of the principle of separation of powers, and has even been repeated and confirmed as it appears from a letter from the Minister for Foreign Affairs dated October 26, 1926, addressed to the *huissier* Olivera, and produced at the hearing; and consequently, without there being need for making decisions on the other points raised and especially on that relating to the alleged secret documents, the present decision dealing only with the Cassation decision of 1912 and the letter mentioned, all immaterial points remaining undecided, the result is a declaration that the judges below have properly rejected the principal arguments of Bigelow;

Whereas, with regard to the subsidiary arguments, the judges below likewise acted justly in not entertaining them; referring to the conversations as charged in the original complaint, which tend to accuse Princess Zizianoff of having acted as a spy in Russia for the Germans, of having even been deported on that account, and of having later been a spy among the American patriotic societies for the Soviet Government, whose embassy she visited in Paris, we cannot discover a performance of an official act in the holding of such conversations;

Whereas, moreover, as the judgment below declares, the defendant is prosecuted, not for refusal of a passport, which would be an act in his consular capacity and would consequently be outside any jurisdiction of the courts, but only for having, in his communication of that decision of his country, delivered himself on the subject of said refusal of the above-described comments, which were not its necessary and indispensable corollary; and as in these comments, viewed as apart from or included in the official act itself, there is a serious wrong susceptible of injuring private interests and having a personal character; and this wrong, which is clearly unconnected with the duty performed by Bigelow and is not at all required in the examination of the said official act, would, if it is established, involve him in penal liability by reason of the criminal elements which it appears to contain;

For these reasons, and those of the judges below not inconsistent therewith;

And declaring that there is no legal reason for acceding to the requests of Bigelow, the present decision, dealing only with the documents already in evidence, confirms the judgment below in its declaration of jurisdiction over the suit brought at the request of the civil party;

Consequently rejects the contentions of Bigelow on appeal as ill-founded;

Condemns Bigelow to the costs of the appeal.

M. Reynaud, Attorney General.—M[es] Rosenmark and de Moro-Giafferi, Attorneys.

NOTE.—See on the questions raised the conclusions of Attorney General Reynaud, reported above, and our note on the judgment of the Correctional Tribunal of the Seine of April 5, 1927 (*Gaz. Pal.* 1927. 2. 18) rendered in the present case.—Also the Council of State, May 26, 1926 (*Journ. dr. intern.* 1927. 122 and note). See also an anonymous article respecting the Cassation decision of February 23, 1912, in the *Journal de droit international*, 1913, p. 23.

TRIPARTITE CLAIMS COMMISSION *

(United States, Austria, and Hungary)

ACT OF THE COMMISSIONER TAKEN IN PURSUANCE OF "SETTLEMENT OF WAR CLAIMS ACT OF 1928" FIXING THE RATE OF EXCHANGE AND OF INTEREST AND THE PERIOD DURING WHICH INTEREST SHALL RUN WITH RESPECT TO INTERLOCUTORY JUDGMENTS ENTERED BY THE COMMISSIONER [1]

April 9, 1928

Whereas the statute enacted by the Congress of the United States of America designated "Settlement of War Claims Act of 1928," which became

* Established in pursuance of the agreement between the United States, Austria, and Hungary which became effective Dec. 12, 1925. Edwin B. Parker, Commissioner; Robert W. Bonynge, American Agent; Ernst Prossinagg, Austrian Agent; Alexis de Boer, Hungarian Agent.

[1] Entered upon the minutes of the 18th meeting of the Commission, Washington, D. C., April 9, 1928.

effective on March 10, 1928,[2] upon its approval by the President of the United States, provides in substance that the Commissioner of the Tripartite Claims Commission (United States, Austria, and Hungary) is authorized and requested with respect to interlocutory judgments entered by him to fix such rate of exchange for the conversion of foreign currency into money of the United States and to fix such rate of interest applicable to said interlocutory judgments and such period during which such interest shall run as he may determine to be fair and equitable, and to give notice thereof within thirty days after the coming into force of said Act; and

Whereas the said Commissioner has considered all statements and arguments submitted by the Government of the United States and the Government of Austria and the Government of Hungary dealing with the fair and equitable rate of exchange and of interest and the period during which interest shall run, and is prepared to comply with the said request and to exercise the said authority conferred by said Act;

Now, therefore, the said Commissioner, being fully advised in the premises, does hereby comply with the said request and exercise the said authority conferred upon him and does hereby fix the rate of exchange at which all interlocutory judgments entered or to be entered by the Commissioner in foreign currency shall be converted into money of the United States, and the rate of interest applicable to all interlocutory judgments entered or to be entered by him and the period during which such interest shall run, as follows:

SECTION I. *Rate of Exchange*

(a) *Gold currency.* Interlocutory judgments expressed in gold foreign currency shall be converted into United States currency at the rates following:

(1) 20.26 cents to the Austro-Hungarian gold krone;
(2) 48.237 cents to the Austro-Hungarian gold gulden or florin;
(3) 19.3 cents to the French gold franc;
(4) 23.82 cents to the German gold mark;
(5) $4.87 to the British gold pound.

(b) Interlocutory judgments classified by the Commissioner as B(1) and stated in foreign currency (other than gold) shall be converted into United States currency at the rates following:

(1) 12 cents to the Austro-Hungarian paper or silver gulden or florin;
(2) 6 cents to the Austro-Hungarian krone;
(3) 10 cents to the German mark;
(4) 12 cents to the French franc;
(5) $4.76 to the British pound sterling.

(c) All interlocutory judgments classified by the Commissioner as B(2) stated in a foreign currency (other than gold) shall be converted into United

[2] Printed in Supplement to this JOURNAL, April, 1928 (Vol. 22), p. 40.

States currency at the cable transfer rate of exchange found by the Commissioner to have been in effect (at New York in case of British or French currency and at Zurich in case of all other currencies) at the time the claim became impressed with American nationality, by the naturalization of the claimant or otherwise through operation of law, not exceeding, however, the rate fixed for conversion of interlocutory judgments classified by the Commissioner as B(1).

(d) Interlocutory judgments, if any, which may hereafter be entered by the Commissioner expressed in a foreign currency other than those hereinbefore enumerated shall be converted into United States currency at a rate of exchange to be fixed by the Commissioner, at the time of the entry of such judgments.

SECTION II. *Interest*

The rate of interest applicable to interlocutory judgments and the period during which such interest shall run are fixed as follows:

(a) Prior to January 1, 1929, interest shall not be payable on judgments based on dividends, interest, or other periodical payments which themselves represent interest on capital. Beginning with January 1, 1929, such judgments, if any, remaining unpaid shall bear interest at the rate of five per cent per annum.

(b) Where the obligation upon which the judgment is founded expressly stipulates that the obligation shall not bear interest after maturity, interest shall not run prior to January 1, 1929; but beginning with that date interest shall run at the rate of five per cent per annum.

(c) In all cases not falling within the preceding paragraphs (a) or (b) where the obligation upon which the judgment is based matured prior to December 7, 1917, interest shall run beginning on December 7, 1917, until paid; and where the obligation matured on or subsequent to December 7, 1917, interest shall run from the date of maturity until paid.

(d) The rate of interest shall be five per cent per annum except in cases where the judgement finds a different contractual rate of interest stipulated, in which event the rate shall be the contractual rate.

(e) A deposit in the Austrian special deposit account or in the Hungarian special deposit account, as the case may be, in pursuance of the provisions of the Settlement of War Claims Act of 1928, of an amount sufficient to make the payments in respect of the awards (as defined in said Act) against Austria or against Hungary, as the case may be, authorized by subsection (b) of section 5 of said Act, shall be treated as a payment within the meaning of this Section II.

Done at Washington April 9, 1928.

EDWIN B. PARKER,
Commissioner of the Tripartite Claims Commission.

HENRY ROTHMANN *v.* AUSTRIA AND HUNGARY (Docket No. 8)

July 11, 1928

Section 2 of the Act of Congress of March 2, 1907, in reference to the expatriation of citizens and their protection abroad, provides a definite rule, in terms of time of residence in a foreign state, fixing the status of one who after acquiring American citizenship through naturalization takes up his residence abroad. The statute fixes the correlative rights and obligations of the Government of the United States and the individual concerned for the period during which the statutory presumption of expatriation remains in effect. While the presumption of law is not conclusive and may be later overcome, the nationality of a claim is determined by the status of claimant's citizenship at the time the claim arose. As at that time the claimant in the present case was not entitled to and was expressly denied recognition and protection as an American citizen, the claim cannot be impressed with American nationality through the subsequent acts of the claimant, even should such acts operating prospectively be held to overcome the legal presumption which the statute had raised against him. His citizenship, as determined by the statutory rule then in effect, and all of his rights dependent thereon, were then permanently impressed upon the claim.*

This claim is put forward on behalf of Henry Rothmann as a naturalized citizen of the United States to recover $151,613.01 against Austria and Hungary on account of damages alleged to have been sustained by him resulting from enforced military service in the Austro-Hungarian army and from alleged confiscation of real and personal property located in territory of the former Austrian Empire now constituting a part of Poland and also on account of an indebtedness alleged to be due him by the respondent governments.

The Commissioner finds (1) that the claimant has failed to prove that the Austro-Hungarian military authorities or representatives of either respondent government seized, confiscated, or damaged any property belonging to him or that either of the respondent governments is indebted to him and (2) that the claimant has failed to prove that the property located in Austria belonging to the partnership of which he was a member was confiscated by the Austro-Hungarian military authorities or by representatives of Austria or Hungary. It results from these findings that with respect to the items based upon alleged indebtedness and confiscation of and damage to property no liability has been established against the respondent governments.

With respect to the only remaining item, based upon enforced military service in the Austro-Hungarian army, the respondent governments admit that claimant was forced to perform certain services in connection with their armies. They deny that claimant was ever an American citizen; they allege that if he ever obtained a certificate of naturalization as a citizen of the United States it was by fraud, and that even if he had obtained naturalization he had by his subsequent acts and under the laws of the United States ceased to be an American citizen and had placed himself beyond the protection of the American Government.

In the absence of convincing proof of fraud in obtaining naturalization, and in view of the facts reflected by the record, the inquiry arises, At the time of the alleged occurrences of which complaint is made did claimant

* Headnote by the Managing Editor of the JOURNAL.

have such status of American citizenship as to impress this claim with American nationality?

[The Commissioner, after stating his conclusions of fact relevant to this question, "drawn from the hopelessly conflicting evidence contained in the voluminous and unsatisfactory record," continued as follows:]

In determining the status of claimant's citizenship at the time of the occurrence of the events of which he complains, it becomes necessary to construe and apply to the foregoing conclusions of fact Section 2 of the Act of the Congress of the United States effective March 2, 1907, entitled "An Act in reference to the expatriation of citizens and their protection abroad", which provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.
>
> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Opinions and decisions construing and applying the provisions of this statute are not readily reconciled.[1] In seeking its purpose it must be borne in mind that the admission by a nation of an individual to citizenship implies not only the duty of protection by that nation but the assumption by the individual of the correlative obligations and duties inherent in citizenship. When an individual foreswears allegiance to his native country and takes the oath of allegiance to the United States of America, that nation will exact from its new citizen the assumption by him in fact as well as in name of the duties which he owes to it, and cannot tolerate his treatment of his new allegiance as a mere form to be used as a cloak to be put on or laid off to suit his convenience and merely to protect him against the discharge of the duties and obligations which he previously owed to his native country or which he assumed toward his adopted country. To permit such use to be made of the privilege of acquiring American citizenship through naturalization would be to permit the perpetration by the individual of a fraud on both his native and his adopted nation.

[1] Sinjen *v.* Miller, 281 Federal Reporter (hereinafter cited as Fed.) 889; Miller *v.* Sinjen, 289 Fed. 388; United States *ex rel.* Anderson *v.* Howe, 231 Fed. 546; Banning *v.* Penrose, 255 Fed. 159; Stein *v.* Fleischmann Co., 237 Fed. 679; Nurge *v.* Miller, 286 Fed. 982; Thorsch *v.* Miller, 5 Fed. (2nd) 118; Nelson *v.* Nelson, 113 Nebraska 453; 28 Opinions of Attorneys General 504; Opinion of Attorney General Sargent rendered February 8, 1928; Compilation of Certain Departmental Circulars, etc., Department of State, 1925, pages 119 to 126; Departmental Order No. 438 issued by Secretary of State, dated March 6, 1928.

In an attempt to provide against such imposition by naturalized citizens, the Congress of the United States enacted the second paragraph of Section 2 of the Act of March 2, 1907, above quoted. Its purpose is thus expressed by the Committee on Foreign Affairs in reporting the bill to the House of Representatives:

> . . . This citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.

This statute provides a definite rule, in terms of time of residence in a foreign state, fixing the status of one who after acquiring American citizenship through naturalization takes up his residence abroad. Previous to its adoption competent government authorities were required, under circumstances of great difficulty, to apply general principles to the facts of each particular case in determining the right to protection abroad of one who had become an American citizen through naturalization. This involved inquiring into the motives prompting the individual to reside in a foreign state and his intentions with respect to remaining there or returning to the United States. The statute substituted a definite rule, comparatively simple and uniform in its application—a rule of expediency. It is a rule of evidence but something more. It fixes the correlative rights and obligations of the Government of the United States and the individual concerned for the period during which it remains in effect. While the presumption of law is not conclusive and residence abroad for the period prescribed by the statute does not of itself terminate permanently American citizenship, nevertheless when the statutory period has run and the legal presumption has arisen against the individual he has for the time being forfeited all right to be recognized as an American citizen and protected as such. He can overcome this statutory presumption (at least so long as he resides abroad) by complying with the rules prescribed by the Department of State in pursuance of the statute, which rules while in effect are as binding as the terms of the statute itself.

The real question here presented is, What is the nationality of the claim here asserted as determined by the status of claimant's citizenship during the material period when the acts complained of by him occurred? This status must be determined by the law then in effect as applied to evidence now produced but then available. Neither the United States nor Austria could foresee, or were required to foresee, future events or the future state of mind of claimant which would impel him or not at some indefinite future

time to pursue a course tending to overcome the legal presumption raised by the statute against him.

Claimant was voluntarily in Austria, the land of his birth, and subject to its jurisdiction. He sought to avoid obligations of citizenship to his native land on the ground that through naturalization he had become an American citizen. But he had voluntarily placed himself beyond the jurisdiction of his adopted country and sought to be recognized by it as its citizen, not in order to return to the United States and serve it but to avoid serving Austria. He was concerned with promoting his selfish interests free from obligation to either his native or his adopted country. At a time when the relations between the United States and the Central Powers were reaching the breaking point, when the United States was interested in having within its jurisdiction all of its citizens capable of rendering military service, its Embassy at Vienna issued to claimant an emergency passport for immediate use in returning to the United States. In applying for this passport claimant deliberately suppressed the fact that he was then and had for some six months been serving in the Austro-Hungarian army. The passport was issued on claimant's misrepresentation that he was in a position to proceed at once to the United States and would do so. When these facts came to the knowledge of the American authorities they at once took up and cancelled the passport, refused to interpose to assist him in procuring release from military service, for which assistance he then for the first time applied, and expressly declined to recognize him as an American citizen. Prior to that time the American Department of State had expressly held that the statutory presumption of expatriation had arisen against claimant and this presumption and holding remained in effect.

On behalf of the claimant it is contended that his return the latter part of 1919 to the United States, where he has since resided, has retroactively overcome the legal presumption which the statute raised against him during the material period and the presumption must be treated as if it had never existed. The Commissioner expressly declines to deal with the effect, operating prospectively, of a return to the United States by one against whom the statutory presumption of expatriation has arisen while residing abroad, or how this presumption can be overcome after such return, as a decision of these questions is not necessary to a disposition of this case. The Commissioner rejects the contention that the subsequent overcoming of the presumption can affect the nationality of this claim which had arisen during the time when claimant was not entitled to recognition and protection as an American citizen; especially as the very existence of the claim turns on the status of claimant's citizenship at the time it arose.

The effect of the rule here contended for would be to permit the Government of the United States to say to the government of another state: This man is not today entitled to protection as an American citizen, but if today you do not treat him as such he may, at his election and by his voluntary

act, at some indefinite time in the future, change his status, whereupon the United States will then on his behalf demand that your government pay damages for its failure to give to him now the recognition to which he is not entitled.

The purpose of the statute is to deny the protection due an American citizen to one against whom an unrebutted presumption of expatriation has arisen. That purpose would be defeated if claimant could, subsequent to the events forming the basis of a claim, overcome the presumption, and then as an American citizen demand and receive compensation as damages resulting from acts against which he was not entitled to protection.

The nationality of the claim here asserted is determined by the status of claimant's citizenship at the time the claim arose, and as at that time the claimant was not entitled to and was expressly denied recognition and protection as an American citizen the claim cannot be impressed with American nationality through the subsequent acts of claimant, even should such acts operating prospectively, be held to overcome the legal presumption which the statute had raised against him. His citizenship, as determined by the statutory rule then in effect, and all of his rights dependent thereon were permanently impressed upon the claim here asserted, and the nationality thereof cannot be affected by claimant's subsequent acts.

On the record submitted the Commissioner holds that throughout the material period claimant was not entitled to recognition or protection as an American citizen; that because of his then status the competent authorities, designated to act for the United States in dealing with him and others similarly situated, expressly declined then to recognize him as an American citizen or to interpose then to obtain his release from military service in the Austro-Hungarian army; that on claimant's behalf the Government of the United States cannot now complain that the Austrian authorities then pursued a like course and declined to recognize claimant as an American citizen; and that this claim, based on enforced military service by claimant, who at the time had presumptively ceased to be an American citizen, is not one which from its inception was impressed with American nationality, and hence does not fall within the terms of the Treaties of Vienna and of Budapest.

For the reasons stated the Commission decrees that neither the Government of Austria nor the Government of Hungary is obligated under the Treaty of Vienna or of Budapest to pay to the Government of the United States any amount on behalf of Henry Rothmann, claimant herein.

EDWIN B. PARKER,
Commissioner.

Done at Washington July 11, 1928.

LOUIS JOHN HOIS *v.* AUSTRIA AND WIENER BANK-VEREIN

July 24, 1928 (Docket No. 15).

An Austrian statute under certain conditions authorizes a debtor to discharge his debt by depositing the amount thereof in court at the risk and subject to the disposition of the creditor. *Held:* Such a court deposit made prior to July 16, 1920, of the amount of a pre-war debt payable in Austria owing by an Austrian debtor to an American creditor operated as a discharge and extinguishment of the debt, which for the purposes of the Treaty of Vienna ceased to exist as of the date of the deposit.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II [a], the United States on behalf of the claimant, Louis John Hois, an American national, seeks an interlocutory judgment for 11,012 kronen, the amount with interest of the credit balance of an account opened by claimant on August 15, 1916, in the Wiener Bank-Verein, a corporate Austrian national (hereinafter designated bank).

The uncontroverted facts briefly stated are:

(1) On December 10, 1912, the claimant through naturalization became and has since remained a citizen of the United States.

(2) On August 15, 1916, the claimant, who then and has since resided in Milwaukee, Wisconsin, established in his own name with the bank in Vienna a general checking account in the amount of 10,000 kronen which bore interest at the rate of 3% per annum.

(3) On January 1, 1917, and at semi-annual intervals thereafter the bank sent to the claimant, who received and retained without objections, regular statements of account calling the claimant's attention to the general conditions governing the relations between the bank and claimant printed on the statement, among these being the following:

> Unless otherwise agreed upon we are entitled to cancel existing connections at any time and according to our free decision.
>
> The relations existing between us and our business friends are in general being governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the city of Vienna is to be considered the place where payment is to be made or where obligations are to be met, as the case may be.

(4) On July 21, 1919, the claimant in addressing the bank by letter with respect to his deposit of 10,000 kronen wrote: "I presume that the Austrian Government has sequestrated this sum and, as in this case I will apply to the American Government for indemnification, I ask you to kindly inform me how this matter stands."

(5) To this inquiry the Austrian bank replied under date of August 18, 1919, assuring the claimant that his account had not been subject to sequestration, but that with accumulated interest he then had a credit balance with the bank of 10,846 old kronen which he was at liberty to dispose of in any way he saw fit.

[a] Printed in this JOURNAL, Vol. 21 (1927), p. 610.

(6) Section 1425 of the Austrian General Civil Law Code, which has been continuously in effect since the date of its enactment in 1812, provides:

> If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or if it is not susceptible of such action, he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligations and places the subject matter delivered at the risk of the creditor.

(7) On October 24, 1919, the bank cabled the claimant: "Offer you prompt repayment of your pre-war credit balance. Cable immediately to avoid depositing to law courts as trustee."

(8) Receiving no reply from the claimant, the bank on November 14, 1919, in pursuance of Section 1425 of the Austrian General Civil Law Code, quoted above, deposited in the office of the Circuit Court of Vienna (which was the appropriate court in which to make this deposit, pursuant to this section of the code) old kronen unstamped banknotes in the amount of 11,012 kronen, being the full amount of claimant's deposit with the bank with accrued interest, which notes were received at the deposit office, put in an envelope, sealed and earmarked as held for claimant's account. These notes have since been and now are held in the physical custody of the deposit office of the court. Due notice of the fact of such deposit was promptly given to the claimant by the bank as well as by the court, and was received by claimant during December, 1919. The claimant was advised that these banknotes were at his free disposal and held subject to his order.

(9) From the letters of the bank to the claimant of December 3, 1919, and January 20, 1920, it is apparent that the action taken by the bank in seeking to discharge its indebtedness to the claimant through making this court deposit was taken to protect itself against the terms of the Clearing Office provisions of the Treaty of St. Germain which was signed on September 10, 1919, and which became effective on July 16, 1920.

(10) From claimant's letter to the bank of December 29, 1919, it is apparent that the claimant received the bank's cable of August 24 offering prompt repayment of claimant's pre-war credit balance and advising that if not accepted by claimant it would be deposited in the law courts, but in claimant's own language as he "did not know how to act intelligently . . ., I refrained from taking any action."

The deposit established by the claimant with the bank on August 15, 1916, constitutes a debt within the meaning of the treaty unless it has been discharged and extinguished. The sole question for decision in this case is, On the facts stated what if any debt is due and owing by the bank or other Austrian national to the claimant within the meaning of the Treaty of Vienna?

The contract which established the relation of creditor and debtor between claimant and the bank expressly stipulated that "the city of

Vienna is to be considered the place where payment is to be made or where obligations are to be met, as the case may be," and that the contract should be "governed by the laws in force in Austria."

These stipulations express the rule which would obtain in this case in the absence of any express agreement of this nature. Its basis is that governing the construction of all contracts—the intention of the parties, who when they stipulate that transactions shall occur in a particular place manifestly intend, in the absence of an agreement to the contrary, that their performance shall be governed by the laws of that place. In considering contract claims, international tribunals have applied and given effect to the law of the place of performance.[1] This rule has been adopted and applied by the several Mixed Arbitral Tribunals constituted and functioning under the Treaty of Versailles, the Treaty of St. Germain, and similar treaties of peace.[2] It is recognized as the law by publicists and jurists, including those of Austria and of the United States,[3] and by the highest courts of both.[4] Effect will be given to this rule, where applicable, in all cases coming before this Commission.

The relation of creditor and debtor was established between the claimant and the bank on August 15, 1916. At that time Section 1425 of the Austrian General Civil Law Code, quoted above, had been in effect and constantly availed of for more than a century. It was in full force and effect so far as concerns this claimant and the bank on November 14, 1919, when the court deposit above mentioned was made. The bank was entitled at any time by payment to terminate the relation of debtor and creditor which existed between it and the claimant. To its offer so to do the claimant made no reply. Following this default by claimant the statute authorized the bank to make the deposit in court, for the creditor cannot by remaining passive

[1] Puerto Cabello & Valencia Railroad Co. (Venezuelan Arbitrations Mixed Claims Commission, Ralston's Report, Senate Document 316, 58th Congress, 2d Session, p. 455); Pacific Mail Steamship Company (Convention between the U. S. and New Granada), Moore's Arbitrations, p. 1412; Henry Woodruff *v.* Venezuela, Morris' Report, 1904, p. 321–3; "Manoa Cases," Morris' Report, 1904, p. 451; Henry Woodruff and Flannagan, Bradley, Clark & Co. (United States and Venezuelan Claims Commission, 1889–1890, p. 425).

[2] Wolff *v.* Morley, 5 M. A. T. 670; Haeraeus *v.* Griffin, 5 M. A. T. 675; Gruening *v.* Frankel Brothers before the Anglo-German Mixed Arbitral Tribunal (1 M. A. T. 726).

[3] Savigny, System of the Present Roman Law, 8, 200 *et seq.*; Unger, System of Austrian General Civil Law, I, 179; Story, Commentaries on the Conflict of Laws, 7th edition, Section 342, p. 279; Wharton, Treatise on the Conflict of Laws, 3rd edition, Section 401, p. 862–3; Phillimore, Commentaries on International Law, etc., 3rd edition, p. 525; Westlake, Treatise on Private International Law, 7th edition, Section 212, p. 302; Foote, Concise Treatise on Private International Law, 5th edition, p. 429; Dicey, Conflict of Laws, 3rd edition, p. 602; Dernburg, The Civil Law of the German Empire, I, 103.

[4] Zimmermann & Forshay *v.* Wiener Bank-Verein, 274 U. S. 253; London Assurance *v.* Companhia de Moagens, 167 U. S. 149; Austrian Supreme Court, S. Z. III No. 79, IX No. 56, No. 152 (Spr. Rep. No. 13); V No. 30, Slg XVI No. 6352 (Spr. Rep. No. 219).

deprive the debtor of a legal right.[5] In making this deposit all of the requirements of the statute were fully met by the bank. It follows that in pursuance of the provisions of the applicable Austrian law the bank's debt to claimant was discharged and extinguished and the relation of debtor and creditor terminated [6] as of November 14, 1919.[7]

On behalf of the claimant it is contended that even if the bank's indebtedness to him was discharged by the court deposit the same debt is still due him by an Austrian national, viz: the Government of Austria, or the Austrian court, or the clerk or other officer having the custody of the court deposit. This contention is rejected. The deposit office in receiving and holding the deposit for and subject to the order of the claimant acted in strict accordance with the Austrian statute. In so doing it performed a governmental function. In no sense did the Austrian state or those acting for it become debtor to the claimant. The kronen deposited never became the property of the state, which had no pecuniary interest therein. The state and all those acting for it, in receiving and holding the deposit, acted in a public and not a private capacity, and what they did in pursuance of the Austrian statute did not operate to keep alive the indebtedness which had been due the claimant and which was terminated as definitely and completely as if payment had been made directly to the claimant and full acquittance executed and delivered by him.[8]

On behalf of claimant it is further contended that by the "device" of a court deposit made by the bank in pursuance of the municipal law in effect in Austria, for the express purpose of protecting itself against the terms of the Clearing Office provisions of the Treaty of St. Germain, which had been signed but had not then come into force, the debtor is seeking to defeat the very purpose of that treaty, and Austria is seeking to evade the burden of valorization of debts which the terms of that treaty place upon her, and that all acts taken in furtherance of these purposes are void. Paraphrasing the language of Mr. Justice Holmes of the Supreme Court of the United States,[9]

[5] Hasenoehrl, Austrian Law of Obligations, 2nd Vol., 1898, p. 498 and 510; Ehrenzweig, System of Austrian General Private Law, 2nd Vol., 1st half, 6th edition, 1920, section 347, p. 302.

[6] Zimmermann & Forshay *v.* Wiener Bank-Verein, 274 U. S. 253; Bamberger *v.* Steinhauser, decided by the Supreme Court of Austria, December 14, 1927; Hasenoehrl, Austrian Law of Obligations, 2nd Edition, Section 94, p. 510; Schey, Concept and Substance of the Mora Creditoris in Austrian and in General Law (1884, p. 39); Frind, Austrian Court Journal for 1911, No. 8, p. 62; Decision of Supreme Court of Austria, June 28, 1921, Ob II 425; Marelli *v.* Haas, Italo-Austrian Mixed Arbitral Tribunal, 7 M. A. T. 249; Efisio Paris *v.* Impresa Auteried & Co., Italo-Austrian Mixed Arbitral Tribunal, 6 M. A. T. 436.

[7] Hasenoehrl, Z, Sec. 94, p. 498; Krainz-Pfaff, System, 2nd Vol., 4th Ed., 1907, Sec. 344, p. 161; Ehrenzweig, System, 2nd Vol., 6th Ed., Sec. 347, p. 305; Czyhlarz, Gruenhut's Zeitschrift, 6 (1879), p. 669.

[8] Tannenbaum *v.* The Prussian Treasury, 5 M. A. T. 632; Solomon & Co. *v.* Slaatsanwalt, etc., Anglo-German Mixed Arbitral Tribunal, case No. 2214, decided September 30, 1924.

[9] Zimmermann & Forshay *v.* Wiener Bank-Verein, 274 U. S. 253.

the short answer to this contention is that claimant's rights against the bank were ended before the treaty became effective.

But there are other answers. Assuming that the bank did make the court deposit in question for the express purpose of protecting itself against the terms of the Clearing Office provisions of the Treaty of St. Germain, neither the United States nor its nationals can complain of its so doing, for the reasons, amongst others, that the United States declined to become a party to the Treaty of St. Germain, and while the provisions of that treaty here under consideration were incorporated into the Treaty of Vienna, the United States by deliberate inaction refused to adopt the Clearing Office plan, and by so doing refused to put into effect the provisions against which the bank sought to protect itself. It is manifest that neither the United States nor its nationals can complain that the bank took measures to protect itself against treaty provisions which never became effective as between the United States and Austria.

Section III of Part X (Economic Clauses) of the Treaty of St. Germain provided for the *reciprocal* settlement of "debts" between the nationals of the opposing Powers through the intervention of Clearing Offices. Each of the Allied and Associated Powers had the option to adopt or not the Clearing Office plan. Paragraph (a) of Article 248 of the treaty provided that:

> (a) Each of the high contracting parties shall prohibit, as from the coming into force of the present treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices.

It is clear that these provisions prohibiting payment of debts were as between Austria and other nations applicable only to those nations adopting the Clearing Office plan; that they were to be effective, if at all, only as from July 16, 1920, the date of "the coming into force of the present treaty"; and that they were reciprocal, applying alike to the United States and to Austria. The treaty makers could readily have stipulated that the prohibition-of-payment provisions should be effective as from the date of the *signing* of the treaty; or could have gone further and provided that all such payments made after the Armistice of November 3, 1918, should be void,[10]—but they did not do so. On the contrary in this respect they left nothing to construction but *expressly* stipulated that these prohibitory provisions should be effective "as from the coming into force of the present treaty." It is not permissible for the Commissioner to speculate with respect to what the treaty makers might or could or should have provided when their language is clear.

While the United States signed the Treaty of St. Germain, it never through ratification became a party to it. However, all of the provisions of the Treaty

[10] A precedent for such a stipulation is found in the last sentence of paragraph 1 of the Annex to Section IV of Part X of the treaty making void all exceptional war measures taken by Austria and Austrian authorities since November 3, 1918.

of St. Germain here under consideration were carried into and became a part of the Treaty of Vienna between the United States and Austria signed August 24, 1921, which became effective November 8, 1921. But the United States did not, as it had the right to do, adopt the Clearing Office provisions of the Treaty of Vienna and consequently did not enact any legislation to make effective the reciprocal prohibition-of-debt-payment provisions above referred to. Of the extent to which American nationals, in the absence of any legislation prohibiting their so doing, used depreciated kronen currency in voluntarily discharging their kronen obligations to Austrian nationals, the Commissioner is not advised. But the records of this Commission disclose that such transactions took place without impediment. Obviously the United States and its nationals were not in a position to demand that Austria should prohibit its nationals from paying or discharging, according to the law in effect at the contract place of payment, the debts owing by them to American nationals.

Austria could not foresee that the United States would not ultimately become a party to the Treaty of St. Germain which it had signed and within one month thereafter elect to adopt the Clearing Office plan. Therefore, the prohibition-of-payment decrees which Austria was required to and did enact, in pursuance of the provisions of the treaty, by their terms prohibited Austrian nationals from paying debts owing by them to American nationals. The Supreme Court of Austria has held [11] that these Austrian prohibition-of-payment decrees presented no impediment to an Austrian debtor discharging his indebtedness to an American creditor through a court deposit made in pursuance of Section 1425 of the Austrian General Civil Law Code. The basis of this holding is that while the decrees in question nominally forbade payment, in any form, of debts due by Austrian to American nationals, nevertheless the reason for their enactment was the carrying out of the Clearing Office provisions of the treaty, and as the United States rejected the Clearing Office plan the reason for the decrees failed in so far as they applied to American nationals, and hence the letter of the decrees will not be applied and enforced as between the United States and Austria and their respective nationals.

The Commissioner declines to deal with the effect, if any, of these Austrian decrees, on their coming into force, on the right of an Austrian national through a court deposit to discharge a debt owing by him to an American national, as a decision of this question is not necessary to a disposition of this case. The decree prohibiting payment had not been passed and could not therefore have presented any impediment to the bank's action when the debt due by the bank to the claimant was lawfully discharged.

The further contention is made on behalf of the claimant that the court deposit made by the bank is without legal effect because made in old unstamped kronen, not legal tender, instead of "German-Austrian stamped

[11] Bamberger *v.* Steinhauser, decided by the Supreme Court of Austria, December 14, 1927.

kronen," then legal tender in Austria where payment was made. It would not be profitable to examine here in detail the treaty provisions and the several decrees passed in pursuance thereof bearing on the question here raised. The Commissioner holds that while at the time the court deposit was made German-Austrian stamped banknotes were the legal tender in Austria, nevertheless under the provisions of Section 6 of the Austrian decree of March 25, 1919, it was permissible for the bank to use old kronen unstamped banknotes in the payment of its debt direct to claimant or in discharging this debt through a court deposit.

The Commissioner holds that the debt due by the bank to claimant was lawfully discharged and extinguished through the court deposit made by the bank on November 14, 1919, approximately two years before the coming into force of the Treaty of Vienna on November 8, 1921, under the terms of which treaty this claim is asserted. It follows that no debt exists upon which the interlocutory judgment prayed for can be based.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of Louis John Hois, claimant herein.

Done at Washington July 24, 1928.

EDWIN B. PARKER,
Commissioner.

WAR CLAIMS ARBITER

FUNCTIONING UNDER THE SETTLEMENT OF WAR CLAIMS ACT OF 1928

ADMINISTRATIVE DECISION NO. I

DEALING WITH PATENT CLAIMS

October 31, 1928.

The Arbiter is here dealing with a group of claims, based on patents alleged to have been used by or for the United States or under which it acquired a license or other interest, put forward by those asserting German, Austrian or Hungarian nationality within the meaning of the Act of Congress approved March 10, 1928. Only claims based on patents subjected by the Alien Property Custodian to war measures are embraced within the intent of the Act. The Arbiter is to determine the fair compensation to be paid only for what the Government of the United States took or received for its own use and benefit. In determining the jurisdiction of the Arbiter, a claim must be tested both by the nationality of the claim and the nationality of the claimant.

Construing Sec. 3477 of the Revised Statutes of the United States nullifying assignments of claims against the United States made before the allowance of such claims, with paragraph 4 of subsection (k) of Sec. 3 of the Settlement of War Claims Act of 1928 authorizing payments of certain assignments made prior to the making of the awards, the Arbiter holds as not coming within the intent of R. S. 3477 assignments through involuntary succession, operation of law, etc., but that holders of assignments acquired by purchase or barter for speculation or profit will not be entitled to present their claims to the Arbiter.

The word "use" means an unauthorized use without license of the owner of an invention disclosed by a patent. The words "use *by* . . . the United States" mean a direct use of any invention by the Government of the United States through any department or agency thereof. The words "use . . . *for* the United States" mean use by a contractor for the Government under a contract which expressly requires, directs, or contemplates the un-

authorized use of a patented invention, or which cannot be performed save by the use of such invention, or where the use was with the full knowledge of and on the request of the Government acting through its duly authorized representatives.

The Act empowers the Arbiter to determine the fair compensation to be paid by the United States in respect of the use by or for the United States of any invention disclosed by any enemy-owned patent acquired or assigned by the Alien Property Custodian, provided such use occurred on or after August 1, 1914, and prior to the disposition of the patent by the Custodian, excluding only such use as occurred between the date of the declaration of war and the date of the armistice, both dates inclusive.

The former German owners of patented inventions described in, and covered by any of the patents assigned by the Alien Property Custodian to the Chemical Foundation, Inc., may assert before the Arbiter claims based on use by or for the United States of such patented inventions up to the date of sale and assignment of the particular patent by the Custodian to the Foundation. But after the title to the patents vested in the Foundation, the unauthorized use if any of the patented invention by the United States, or any one else, was an infringement of the rights of the Foundation, not of the former German owners, and hence the German claimants are not entitled to compensation from the United States.

Claims based on sales, assignments, or grants of licenses, made directly by the Alien Property Custodian to the United States clearly fall within the terms of the Act; but claims based on licenses granted to the United States by the Chemical Foundation, Inc., do not fall within the provisions of the Act.

The Arbiter rejects the group of claims for compensation from the United States for patents or licenses thereunder which patents were seized by the Alien Property Custodian and sold and assigned by him to the Chemical Foundation, Inc. The Foundation was created as and is a private corporation. While it was created on the initiative of and under the supervision of those who were at the time officers and agents of the United States, it is in no sense an integral part of or an agency of the Government of the United States. The Supreme Court of the United States has held that the title to the patents here under consideration vested in the Foundation through the sale and assignment to it by the Custodian; that such sale was not tainted with fraud but had been made in pursuance of the lawful provisions of the Trading with the Enemy Act and that the United States was powerless to set aside that sale or to disturb the valid title of the Foundation. Far from being embraced in the term "United States" as used in the Act, or occupying any niche in the structure of the Government of the United States, it is apparent that the Foundation is independent of and in sense a part of that Government.

The Arbiter holds that the rule of American patent jurisprudence to the effect that a licensee will not be heard to deny the licensor's title or the validity of the patent has no application as against the United States in this group of cases and that, to enable the Arbiter to determine the fair compensation to be paid by the United States for the license to a particular patent, the validity of the patent and the claimant's title thereto may be challenged by the Government and inquired into by the Arbiter.

Claims for alleged use by the United States of trade-marks are not embraced within the terms of the Act and are not therefore within the jurisdiction of the Arbiter.

The Arbiter holds that he has no jurisdiction over claims based on patents licenses under which were issued by the Federal Trade Commission, unless such patent was subsequently seized by the Alien Property Custodian subject to the said license and directly licensed, assigned or sold by him to the United States, or unless there was use by or for the United States of the invention not authorized by the Federal Trade Commission license.*

PARKER, *Arbiter*, rendered the following decision:

The Arbiter is here dealing with a group of claims, based on patents alleged to have been used by or for the United States or under which it acquired a license or other interest, put forward by those asserting German, Austrian, or Hungarian nationality within the meaning of the Act of the Congress of the United States of America approved March 10, 1928, cited as the "Settlement of War Claims Act of 1928" [1] and which for convenience will be hereinafter designated as the "Act." Only such claims of this group as fall within paragraphs (3) or (4) of subsection (b) of Section 3 of the Act,

* Headnote by the Managing Editor of the JOURNAL.

[1] Volume 45, United States Statutes at Large (hereinafter cited as "Stat."), page 254. [Supplement to this JOURNAL, April, 1928 (Vol. 22), p. 40.]

dealing with patent claims of German nationals against the United States, or within paragraphs (1) or (2) of subsection (a) of Section 6 of the Act, dealing with patent claims of Austrian or Hungarian nationals against the United States, are within the Arbiter's jurisdiction. The provisions of the paragraphs mentioned dealing with Austrian and Hungarian claims are identical with the paragraphs mentioned dealing with German claims. Throughout this decision references to German claims will be understood as applicable to Austrian and Hungarian claims as well, bearing in mind the difference in the definitions of the nationality of the claim and the claimants as pointed out in the margin.[2]

Throughout this decision the term "patent" will be taken to include any right therein or claim thereto, including any application therefor and any patent issued pursuant to any such application.[3]

Patent claims only are dealt with in this decision. They are based on patents issued by and in pursuance of the Constitution, statutes, and treaties of the United States as construed by the courts of the United States, granting to the patentee for a term of years the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof.[4] While the Act determines the scope and the limits of the rights and the remedies which it creates, it must be borne in mind with respect to the group of claims here dealt with that those rights and remedies pertain to the grant of a monopoly by the United States termed a patent, that such patents and all rights thereunder exist solely by virtue of the laws of the United States, and that their existence, their validity, their value, and everything pertaining thereto must be tested and measured solely by those laws.

PURPOSES OF THE ACT

The Act provides (1) for the settlement of the awards of the Mixed Claims Commission on behalf of American nationals against Germany, and for the settlement of the awards and judgments of the Tripartite Claims Commission on behalf of American nationals against Austria and Hungary, (2) for the settlement of certain claims of nationals of Germany, Austria, and Hungary against the United States, and (3) for the ultimate return to nationals of Germany, Austria, and Hungary of property held by the United States Alien Property Custodian (hereinafter designated "Custodian"). While the

[2] The terms "German national" and "Austrian national" and "Hungarian national" are defined in Section 22 of the Act. The difference in the dates found in these definitions is due to the fact that the existence of a state of war between the United States and Germany was by the United States declared on April 6, 1917, and the existence of a state of war between the United States and Austro-Hungary was by the United States declared on December 7, 1917.

[3] Paragraphs (3) and (4) of subsection (b) of Section 3 of the Act; also paragraphs (1) and (2) of subsection (a) of Section 6 of the Act.

[4] Revised Statutes, Section 4884.

Arbiter is here directly concerned only with those provisions dealing with certain claims of the nationals of Germany, Austria, and Hungary against the United States, nevertheless in construing those provisions and seeking the legislative intent he must consider all of the purposes and the comprehensive nature of the Act as a whole.

JURISDICTION OF THE ARBITER

In a broad and general sense the evident purpose of the Congress was to provide for the final disposition of war claims of the United States and its nationals on the one part and of its former enemy nations and their nationals on the other part, which arose out of war measures, and for the ultimate return of property which, at the time it was seized by the Custodian, as a war measure, belonged to nationals of Germany, Austria, or Hungary. The provisions of the Act must be broadly and liberally construed to effectuate that purpose. But it is for the Congress, not for the Arbiter, to determine the measures necessary to that end. In determining what claims fall within his jurisdiction, the Arbiter's duty is limited to seeking out and giving effect to the intent of the Congress. His functions are judicial—not legislative. The Act is his charter. He has no concern with claims not embraced within its terms. His jurisdiction is a limited one. He cannot add to or take from that jurisdiction as defined by the Act. With respect to claims falling within his jurisdiction his powers, derived from the Act, are broad. Those powers will be exercised by him to give effect to the purpose and intent of the Congress in declaring the policy of the Government of the United States in dealing with the claims of an international nature falling within the terms of the Act.

CLAIMS AGAINST THE UNITED STATES—WAR CLAIMS

Four categories of claims of German nationals against the United States are dealt with in subsection (b) of Section 3 of the Act, which is copied in the margin.[5] The first of these pertains to German merchant vessels title to which was taken by or on behalf of the United States under the authority

[5] Subsection (b) of Section 3 of the Act reads as follows:

"(b) It shall be the duty of the Arbiter, within the limitations hereinafter prescribed, to hear the claims of any German national (as hereinafter defined), and to determine the fair compensation to be paid by the United States, in respect of—

"(1) Any merchant vessel (including any equipment, appurtenances, and property contained therein), title to which was taken by or on behalf of the United States under the authority of the Joint Resolution of May 12, 1917 (Fortieth Statutes, page 75). Such compensation shall be the fair value, as nearly as may be determined, of such vessel to the owner immediately prior to the time exclusive possession was taken under the authority of such Joint Resolution, and in its condition at such time, taking into consideration the fact that such owner could not use or permit the use of such vessel, or charter or sell or otherwise dispose of such vessel for use or delivery, prior to the termination of the war, and that the war was not terminated until July 2, 1921, except that there shall be deducted from such value any consideration paid for such vessel by the United States. The findings of the Board of Survey appointed under the authority of such Joint Resolu-

of the joint resolution of the Congress of May 12, 1917.[6] This joint resolution was a war measure.

The second category pertains to any radio station which was sold to the United States by or under the direction of the Custodian. The Trading with the Enemy Act and the measures taken by the President and the Custodian under that Act, including the sale of the radio station dealt with in this second category, were war measures.

The third category pertains to German-owned patents which, as a war measure, were seized by the Custodian and by him licensed, assigned, or sold to the United States.

The fourth category pertains to the use by or for the United States of any invention described in and covered by any German-owned patent which was seized or acquired by the Custodian. The use by or for the United States may have been prior to the seizure of the patent by the Custodian, but generally if not always orders of seizure by their express terms included not only the patent but all claims for infringement thereof. Hence claims for past infringement by or for the United States were, as a war measure, seized with the patent by the Custodian. It is entirely clear that only claims based

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tion shall be competent evidence in any proceeding before the Arbiter to determine the amount of such compensation.

"(2) Any radio station (including any equipment, appurtenances, and property contained therein) which was sold to the United States by or under the direction of the Alien Property Custodian under authority of the Trading with the Enemy Act, or any amendment thereto. Such compensation shall be the fair value, as nearly as may be determined, which such radio station would have had on July 2, 1921, if returned to the owner on such date in the same condition as on the date on which it was seized by or on behalf of the United States, or on which it was conveyed or delivered to, or seized by, the Alien Property Custodian, whichever date is earlier, except that there shall be deducted from such value any consideration paid for such radio station by the United States.

"(3) Any patent (or any right therein or claim thereto, and including an application therefor and any patent issued pursuant to any such application) which was licensed, assigned, or sold by the Alien Property Custodian to the United States. Such compensation shall be the amount, as nearly as may be determined, which would have been paid if such patent, right, claim, or application had been licensed, assigned, or sold to the United States by a citizen of the United States, except that there shall be deducted from such amount any consideration paid therefor by the United States (other than consideration which is returned to the United States under section 27 of the Trading with the Enemy Act, as amended).

"(4) The use by or for the United States of any invention described in and covered by any patent (including an application therefor and any patent issued pursuant to any such application) which was conveyed, transferred, or assigned to, or seized by, the Alien Property Custodian, but not including any use during any period between April 6, 1917, and November 11, 1918, both dates inclusive, or on or after the date on which such patent was licensed, assigned, or sold by the Alien Property Custodian. In determining such compensation, any defense, general or special, available to a defendant in an action for infringement or in any suit in equity for relief against an alleged infringement, shall be available to the United States."

[6] 40 Stat. 75.

on patents subjected by the Custodian to war measures are embraced within either paragraph (3) or paragraph (4) of the Act.

The Congress was dealing only with war claims. The short title of the Act, "Settlement of War Claims Act of 1928," is significant. Nowhere in the Act itself or in the records of the Congress is there found evidence of any intent on the part of the Congress to deal with claims arising out of peace measures taken at any time by any nation. The property to be returned is property seized or acquired by the Custodian as a war measure. The fair compensation, to be determined by the Arbiter, to be paid by the United States pertains to claims based on the acts of the Government of the United States during the World War with respect to certain specified enemy-owned property. If there were room to doubt the intent to limit the Act to war claims it would be removed [7] by the reports of the committees of both Houses of the Congress [8] having this measure in charge. In determining the scope and the limits of any isolated provision of the Act the clear intent of the Congress to deal only with "war claims" must be borne in mind.

FAIR COMPENSATION TO BE PAID ONLY FOR WHAT THE GOVERNMENT OF THE UNITED STATES TOOK OR RECEIVED FOR ITS OWN USE AND BENEFIT

The provisions of the Treaty of Versailles [9] carried into the Treaty of Berlin [10] in effect confirm on behalf of Germany and her nationals all of the acts

[7] Holy Trinity Church *v.* United States (1892), 143 U. S. (Opinions of the Supreme Court of the United States) 457, at pages 464–465; Buttfield *v.* Stranahan (1904), 192 U. S. 470, 495; Cramp & Sons *v.* Curtis Turbine Co. (1918), 246 U. S. 28, 37; United States *v.* St. Paul, M. & M. Railway Co. (1918), 247 U. S. 310, 318; Duplex Printing Press Co. *v.* Deering (1921), 254 U. S. 443, 474; Whitney *v.* United States (1925), 8 Federal Reporter (hereinafter cited as "Fed.") (2d series) 476, 478; In re Ellingsen (1924), 300 Fed. 225, 226; Hampton and L. F. Ry. Co. (1924), 300 Fed. 438, 441; In re Columbia Railway, Gas & Electric Co. (1928), 24 Fed. (2d), 828, 830.

[8] The Committee on Ways and Means (hereinafter referred to as House Committee) in reporting this measure favorably to the House of Representatives on December 15, 1927 (House Report No. 17, 70th Congress, 1st Session, at page 8), had this to say: "Claims of German nationals against the United States Government for compensation on account of *acts of the United States during the war period* divide themselves into three main groups: (1) Ships seized by the United States, (2) a radio station sold to the United States, and (3) patents sold to or used by the United States."

In the favorable report of the Committee on Finance (hereinafter referred to as Senate Committee) made to the Senate of the United States on February 9, 1928 (Senate Report No. 273, 70th Congress, 1st Session), at page 2, the following appears: "Property of German nationals in the United States was seized *during the war* by the Alien Property Custodian under the provisions of the trading with the enemy act, and a large part of it is still retained. . . . The United States Government, under the authority of a joint resolution of Congress, seized and took title to a large number of ships owned by citizens of Germany, and acquired for its own use *during the war* a large number of patents and a radio station. The United States is justly *indebted to the German nationals* for the value of *their property*."

[9] Article 297 (*b*) and (*d*) and paragraphs 1 and 2 of the Annex to Section IV of Part X. Similar provisions are found in the Treaty of St. Germain and in the Treaty of Trianon, the corresponding articles being numbered 249 and 232, respectively.

[10] Articles I and II (42 Stat. 1939). Similar provisions are found in the Treaty of Vienna

of the Alien Property Custodian of the United States and expressly provide [11] that "No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction" (that is, orders, directions, decisions, or instructions of the Custodian) "made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests." This provision is reiterated in different forms to make it clear beyond question that, as applied to the acts and transactions of the Custodian of the United States in his dealings with the property of Germany and her nationals, these transactions should for all purposes be "regarded as having been effectively dealt with" and "considered as final and binding upon all persons";—in other words, a sealed book not to be opened or examined for any purpose. These provisions (with certain exceptions not material here) apply with equal force against the United States and its nationals with respect to the finality and binding force of vesting orders or other orders, directions, decisions, or instructions of the German *Treuhänder* (Custodian for Enemy Property) or any department of the Government of Germany.

These are provisions of expediency, the reason for which is obvious. Both the United States and Germany had as war measures dealt with private enemy property within their respective jurisdictions. To permit the opening up, inquiring into, or setting aside of the many thousands of vesting orders affecting rights or interests in or title to property acquired in good faith in pursuance of war legislation would have had a most far-reaching and demoralizing effect on the already demoralized economic life of both nations. One of the purposes of the "Economic Provisions" of the treaty, of which these formed a part, was to bring order out of comparative chaos, and the provisions here mentioned were in the nature of an international statute of repose.

The Act does not in any way affect these treaty provisions, except that the Congress has seen fit to waive them to the extent—but only to the extent—necessary to provide for the determination and payment of fair compensation with respect to claims falling within the terms of the Act for property taken or used by or for the Government of the United States itself.

But all German property or rights or interests therein seized or acquired by the Custodian and by him sold, assigned, or transferred to private persons is left unaffected and undisturbed, just where it was left by the treaty provisions, and quite independent of any question of the vesting of title by the United States through confiscation as a war measure, which undoubted power to confiscate the Congress has declined to adopt as a legislative policy.[12]

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between the United States and Austria (42 Stat. 1946) and in the Treaty of Budapest between the United States and Hungary (42 Stat. 1951).

[11] Paragraph 1 of the Annex to Section IV of Part X.

[12] ". . . So that notwithstanding the undoubted power of Congress to confiscate, re-

The Act broadly provides that the Arbiter shall determine the fair compensation to be paid by the United States with respect to the four categories of claims described in the Act asserted by those who can qualify as claimants under its provisions.

With these underlying purposes of the Act clearly in mind it will be comparatively easy to seek out and determine the governing legislative intent with respect to isolated paragraphs or phrases.

NATIONALITY OF CLAIMS AND OF CLAIMANTS

In determining the jurisdiction of the Arbiter a claim must be tested both by the nationality of the claim and the nationality of the claimant. Only claims based on patents are here dealt with. They are described in paragraphs (3) and (4) of subsection (b) of Section 3 of the Act. To fall within the jurisdiction of the Arbiter such claims must meet the tests prescribed by those paragraphs. In addition thereto the claimant must be a German (or an Austrian or an Hungarian) national as defined in Section 22 of the Act.

Only patents or rights therein or claims thereto which were acquired or seized by the Custodian fall within the Act. It may well be that the Custodian seized patents of an enemy or ally of enemy as those terms are used in the Trading with the Enemy Act, where the test was geographic—for example, a resident, of whatever nationality, of a country with which the United States was at war, or of a country allied with one with which the United States was at war—rather than citizenship, and where the owners of such patents at the time of seizure were neutrals or citizens of nations associated with the United States in the war, or were even American citizens. But such cases, if any, have been, measurably at least, dealt with by amendments to the Trading with the Enemy Act. The provisions of paragraphs (3) and (4) here under consideration deal only with German (or Austrian or Hungarian) owned[13] patents, used without authority by or for the United

affirmed in the Chemical Foundation case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation." (Report of House Committee December 15, 1927, page 6.)

". . . Of course, the committee is in unanimous accord with the proposition that private property of enemy nationals may not be confiscated, and will not be confiscated, by the United States for the payment of the debts of the enemy government. The United States has always recognized, and doubtless always will recognize, the sanctity of private property. Despite our recently reaffirmed power to confiscate private property of an enemy national, we have always steadfastly insisted upon according private property full protection in the event of war. We have no reason to assume that this policy will be departed from in the future. . . ." (Report of Senate Committee February 9, 1928, page 17.)

[13] In the House Committee Report of December 15, 1927, at page 5, appears the following:

". . . patents . . . *belonging to German nationals* were taken over and used by the United States, and the United States still owes compensation therefor".

In the Senate Committee Report of February 9, 1928, at page 2, this appears:

"The United States Government . . . acquired for its own use during the war a large number of patents. . . . The United States is justly indebted to the *German nationals* for the *value of their property*".

States, or under which it acquired a license or other interest from the Custodian.

Prior to seizure or acquisition by the Custodian there was no impediment (save as hereinafter pointed out[14]) to the German owner selling and assigning or transferring the patent or any interest therein, but the patent or interest therein, to fall within the terms of the Act, must have been owned by a German national, and through such ownership impressed with German nationality at the time of seizure or acquisition by the Custodian.[15] The Act deals only with claims so impressed with German nationality at the time of seizure.

The nationality of the claim itself must not be confused with the nationality of the claimant who is entitled to assert his claim and have it heard by the Arbiter. The Act qualifies as proper parties claimant individuals who on the date of the declaration of the existence of a state of war between the United States and Germany (April 6, 1917) were citizens of Germany, or who on the date of the declaration of the existence of a state of war between the United States and Austro-Hungary (December 7, 1917) were citizens of Austria or Hungary, or individuals who on the effective date of the Act (March 10, 1928) were citizens of Germany or of Austria or of Hungary.

The Act also qualifies as proper parties claimant juridical persons, that is, partnerships, associations, or corporations, which on the date of the declaration of the existence of a state of war between the United States and Germany (April 6, 1917) were organized or created under the laws of Germany, or on the date of the declaration of the existence of a state of war between the United States and Austro-Hungary (December 7, 1917) were organized or created under the laws of Austria or of Hungary. The effective date of the Act (March 10, 1928) has no application to juridical persons.

While these definitions of German, Austrian, and Hungarian nationals are arbitrary, they are definite and binding on the Arbiter, and it will be found that they are not only practical of application but calculated to carry into effect the purpose and intent of the Congress, namely, fairly to compensate German (or Austrian or Hungarian) nationals for the unauthorized use of their patents by or for the United States or for such interest in their patents as was acquired from the Custodian by the United States for its own use and benefit.

[14] *Post*, page 11. [Page 203, herein.]

[15] The Act amends subsection (f) of Section 10 of the Trading with the Enemy Act dealing with the recovery of royalties, for the period prior to sale by the Custodian, under licenses issued by the Federal Trade Commission. The report of the conference managers on the part of the House dated February 27, 1928 (House Report No. 766, 70th Congress, 1st session), at page 33, thus explains this amendment:

". . . Questions have arisen in regard to such suits as to who was the owner of the patent, etc., within the meaning of the section, after seizure by the Alien Property Custodian. This amendment provides that such suits shall be held to have been brought by the owner if brought either by the Alien Property Custodian or *by the person who was the owner immediately prior to the seizure* by, or transfer to, the Alien Property Custodian. . . ."

Under the statutory definition natural or juridical persons who were citizens of Germany or of Austria or of Hungary at the time of the entry of the United States into the war against Germany or against Austro-Hungary, as the case may be, can qualify as proper parties claimant. At that time the territorial boundaries of Germany and of Austria and of Hungary as they existed on August 1, 1914, remained unchanged. But the Treaty of Versailles materially changed the boundaries of Germany and the nationality of those former German citizens residing in the territory ceded by Germany or through plebiscites divorced from Germany; and the Treaties of St. Germain and of Trianon effected a dissolution of the Austro-Hungarian Dual Monarchy and generally speaking changed the nationality of those former citizens of Austria and of Hungary residing in the territories of the Succession States other than the new Republic of Austria and the new Kingdom of Hungary.

It follows, therefore, that any natural or juridical person who on April 6, 1917, was a citizen of Germany, but who became a citizen of another country by virtue of the provisions of the Treaty of Versailles, or through naturalization or otherwise; or any natural or juridical person who on December 7, 1917, was a citizen of Austria or a citizen of Hungary, but who became a citizen of another country by virtue of the Treaty of St. Germain or the Treaty of Trianon, or through naturalization or otherwise, is qualified as a proper party claimant before the Arbiter.[16]

[16] The contention has been put forward that Section 21 of the Act, captioned "Ship Claims of Former German Nationals," indicates an intention on the part of the law-makers not to include former German nationals as claimants save those for which the Act makes special provision. Section 21, when properly understood, evidences exactly the opposite intention on the part of the law-makers. The two vessels dealt with in this section were, at the time the United States took title to them, owned by German juridical persons, all of the members or stockholders of which were on April 6, 1917, citizens of Germany. Representations were made to the Congress that by virtue of a plebiscite held under the Treaty of Versailles they all became citizens of Denmark. The Congress was asked to accord them special treatment with respect to the presentation and *payment* of their claims to the end that the amount, if any, which might be awarded them by the Arbiter should be paid them forthwith in full and no part of it temporarily withheld under other provisions of the Act. Such special treatment was accorded them through incorporating Section 21 in the Act, which is thus explained in the report of the House managers at the conference (February 27, 1928, page 30):

"Section 21 of the Senate amendment is added to provide for the determination of compensation to be paid in the case of two ships seized by the United States which were owned at the outbreak of the war by German nationals who, as a result of a plebiscite under the Treaty of Versailles, became Danish nationals. Inasmuch as all the property of nationals in similar circumstances held by the Alien Property Custodian has been returned without limitation, the section provides that the awards for these ships (not greater than the amount received by the United States upon the sale of the vessels, minus the capital expenditures thereon) shall be paid in full and an appropriation is authorized to make such payment. . . ."

Subsection (d) of Section 21 significantly provides that while "The *provisions of this section* shall constitute the exclusive method for the presentation and *payment* of claims

But no one who, according to the foregoing tests, can qualify as a proper party claimant before the Arbiter so far as his own nationality is concerned can assert a claim before the Arbiter unless he appears as the owner of a claim falling within the terms of the Act and (with respect to patent claims) impressed with German (or Austrian or Hungarian) nationality at the time the patent was seized or acquired by the Custodian. Citizenship is determined by rules prescribed by municipal law. The requisite nationality of a claimant and of the claim asserted by him must be established by him under the laws in force in Germany, Austria, or Hungary at the requisite times. The burden is on the claimant to qualify as a proper party claimant before the Arbiter with respect to his own nationality and also to prove his ownership of a German (or Austrian or Hungarian) claim as above defined and otherwise falling within the terms of the statute.

ASSIGNMENT OF CLAIMS

By the terms of seizure the Custodian generally if not always took title not only to the patents themselves but to all claims against the United States and others for their infringement. Until seized by the Custodian the patents and all claims for infringement thereof belonged to the German owners. Prior to the declaration of the existence of a state of war between the United States and Germany (April 6, 1917) such owners had a right to sell, transfer, and assign at will not only the patents but all claims for infringement thereof, unless a statute of the United States prevented the assignment of claims for infringement against the United States itself. After the United States became a belligerent the German owners could not so dispose of the patents and claims for infringement as to defeat the right of the United States to seize and condemn.[17] They had nevertheless the right to sell, transfer, and assign their patents and claims for infringement to other German nationals residing in German territory, or to anyone else, subject to the prohibitions of the United States Trading with the Enemy Act, and further subject to the statute against assignment of claims against the United States above mentioned.

Counsel for the United States contend in substance that, even if a claimant can qualify under the Act as a proper party with respect to his own nationality, nevertheless he cannot assert a claim before the Arbiter if he deraigns title thereto through a voluntary assignment or attempted assignment made

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. . . for which this section provides a remedy" "This subsection shall not bar the *presentation of a claim under section 3* (relating to the ship claims of German nationals)", but there can not be any award under both Section 21 and Section 3. It is apparent that Section 21 contains an express recognition by the Congress of the right of "former German nationals" who were German nationals on April 6, 1917, to appear and assert their claims before the Arbiter under Section 3 of the Act.

[17] Conrad *v.* Waples (1877), 96 U. S. 279, 286; Briggs *v.* United States (1892), 143 U. S. at 353; Schrijver et al. *v.* Sutherland (1927), 19 Fed. (2d) 688, 689.

subsequent to the use by or for the United States on which the claim is based or subsequent to the date of the seizure by the Custodian. In support of this contention the provisions of Section 3477 of the Revised Statutes of the United States, quoted in the margin,[18] are invoked.

In considering to what extent, if at all, claims against the United States may be assigned, counsel for both the claimants and the Government, appearing in connection with both ship claims and patent claims, have cited the provisions of paragraph (4) of subsection (k) of Section 3 of the Act. As it is apparent that some confusion exists with respect to the scope and meaning of this paragraph, tending to becloud the broader question presented by the contention of government counsel, the Arbiter will first dispose of this paragraph by pointing out that it does not touch the right to assign claims against the United States prior to their presentation to him.

Subsection (k) deals with the *payment* by the Secretary of the Treasury of the *awards* to be made by the Arbiter under Section 3. It in no sense deals with the jurisdiction of the Arbiter to consider claims asserted before him, nor was it intended to affect his disposition of such claims. It provides that—

> . . . *Payment* of any amount in respect of any *award* . . . shall be made only to the person on behalf of whom the award was made, except that— . . .
>
> (4) In the case of an assignment of an award, or of an assignment (prior to the making of the award) of the claim in respect of which such award was made, by a receiver or trustee for any such person, duly appointed by a court of competent jurisdiction, payment shall be made to the assignee.

Under the caption "Claims of German Nationals against United States" the House Committee[19] refers to the section of the bill then before it providing for the "appointment of an arbiter to hear the claims of German nationals," etc., and adds:

> *Assignment is prohibited*, except in case of assignment by a receiver or trustee as in the case of awards of the Mixed Claims Commission.

This identical language is found in the Senate Committee report[20] with this significant change: instead of the phrase "Assignment is prohibited" there are substituted the words "*Payment* to assignees is prohibited."

The reference to the Mixed Claims Commission is found in paragraph (4) of subsection (g) of Section 2 of the Act where, in dealing with the payment of

[18] "SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. . . ."

[19] House Committee Report of December 15, 1927, at page 14.

[20] Report of February 9, 1928, at page 18.

"Claims of Nationals of the United States against Germany," substantially the identical language found in paragraph (4) of subsection (k) of Section 3, above quoted, is used. The Senate Committee[21] in referring to Section 2, said:

> Where a claim against Germany was assigned prior to the entry of the award by the Mixed Claims Commission, the commission would enter the award, if due notice was given, in the name of the assignee. Under the provisions of the section *this is the only assignment which is recognized*, except that in the case of an assignment of the award, including an assignment of any part of the award, by a receiver or trustee duly appointed by a court in the United States, the payment of the amount so assigned will be made to the assignee.

It is manifest that the Act of 1928 could have no possible effect on the jurisdiction of the Mixed Claims Commission to make awards. The Act does not seek to prescribe with what claims the Mixed Claims Commission can deal and Congress is without power so to prescribe. That commission is functioning under an international agreement and adjudicating claims arising under the Treaty of Berlin. With respect to the Mixed Claims Commission the Congress in providing for the *payment* of these claims stipulated that the *awards* could not be assigned, but did not seek to go back of the awards to ascertain whether or not the person on whose behalf an award had been made was claiming under an assignment. To the contrary, the report points out that some awards had been made by the commission in favor of assignees, and such assignees were expressly recognized by the Congress. But where prior to the making of an award by the commission (as well as subsequent thereto) an assignment of the claim was made by a receiver or trustee duly appointed by a court of competent jurisdiction, which assignment had not been called to the attention of the commission, such assignment is expressly recognized. Comparatively few assignments were recognized or given effect by the Mixed Claims Commission, and those recognized were assignments of claims *against Germany* by American nationals to other American nationals. Germany was not interested in the *identity* of the American national to whom an award was made but only in the *amount* awarded. In recognizing these assignments and entering the awards for the use and benefit of the assignee, the Mixed Claims Commission acted in the interest of and for the convenience of those charged with the *payment* of the awards, fully recognizing, however, that while as an international tribunal the commission had the exclusive and final power "to determine *in whom* a cause of action originally vests, as well as to determine all other questions involving its validity and the amount recoverable," nevertheless "that all questions involving the transfer of interest from and through the original owner must be decided by municipal tribunals according to local jurisprudence." [22]

[21] Report of February 9, 1928, at page 17; see also identical language in the report of the House Committee of December 15, 1927, at page 14.

[22] Decisions and Opinions, Mixed Claims Commission, United States and Germany, page 10.

The language found in paragraph (4) of subsection (k) of Section 3, dealing with the payment of awards of the Arbiter, is substantially identical with and used in the same sense as the language found in paragraph (4) of subsection (g) of Section 2, dealing with the payment of the awards of the Mixed Claims Commission, and it is clear that neither provision was intended to touch the right of the assignee of a claim to assert it before the Arbiter or the commission, as the case may be.[23]

But there is another provision of the Act of 1928 which throws some light on the policy of the Congress with respect to the assignment of claims to enemy property after seizure by and while held by the Custodian. Section 9 of the Trading with the Enemy Act as amended provides under certain conditions for the return by the Custodian of property or the proceeds thereof "to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian." The administrative officials of the United States charged with giving effect to the Trading with the Enemy Act have construed the term "owner" as used here and elsewhere in that Act to mean the owner of the property at the time of seizure by the Custodian, and have declined to recognize assignments made by such owner subsequent to such seizure. The judge of a district court of the United States has held such an assignment "absolutely null and void."[24] The Act of 1928 added subsection (n) to Section 9 of the Trading with the Enemy Act, in commenting on which the House Committee[25] under the caption "Return of Property Held by the Alien Property Custodian" referred to certain corporate interests which were seized without obtaining custody of the certificates evidencing those interests, and said:[26]

> . . . As a result the certificate has been sold in Germany and is being dealt in daily on the German exchanges. *Although the committee was convinced that it could not adopt a policy of general recognition of assignments,* it seemed imperative that this situation be met. Accordingly, subsection (n) provides for the recognition of the various assignments and for payment to the present owner of the certificate. . . .

[23] When the legislation was before the Sixty-ninth Congress Mr. Garrard B. Winston, then The Undersecretary of the Treasury, testifying before House subcommittees (page 38 of first volume of the reported hearings, April, 1926) said:

"In the case of the awards of the Mixed Claims Commission it is provided that the awards shall be paid to the person in whose name the *award has been entered.* That relieves the Treasury Department and the Department of State from any necessity of determining who is the real owner of this award, and it leaves anybody who has *a claim against the award* their rights in court, but *we* do not have to decide it.

"In the case of the arbiter, in the awards to Germans, the same rule is followed: That the *awards* are to be *paid* to the persons in whose names the awards are made out."

[24] Sturchler *v.* Hicks (1926), 17 Fed. (2d) 321, 324.

[25] Report of December 15, 1927, at page 21.

[26] This identical language is found in the report of the Senate Committee dated February 9, 1928, at page 30.

Subsection (n), after providing for the recognition of the assignee of certificates of stock or other certificates of interest of the character mentioned, adds:

> it being the intent of this subsection that such assignment, transfer, or sale shall not be deemed invalid hereunder by reason of such conveyance, transfer, assignment, delivery, or payment to the Alien Property Custodian or seizure by him.

The language of this subsection (n), read in the light of the reports of the committees of both Houses of the Congress in commenting thereon, clearly evidences a reluctance on the part of the Congress to relax the rule prohibiting the recognition of any assignment or attempted assignment of any claim to property held by the Custodian.

The Supreme Court of the United States has expressly held that a claim for the infringement of a patent *by* the United States is within the general purpose of Section 3477 of the Revised Statutes prohibiting the assignment of claims against the United States.[27] In a later case the soundness of this holding was challenged only to be reaffirmed by the Supreme Court.[28] In reaffirming this rule, however, the Supreme Court held that Section 3477 does not apply to a claim against the United States for the infringement of a patent by a government contractor *for* the United States arising under the Act of 1918, the effect of which is to deprive the owner of the patent of a remedy against the contractor for the infringement, and to substitute therefor an assumption of liability by the Government. The reason for this distinction is that the Act of 1918 took from the owner of the patent a right to recover from the infringing contractor, which was an assignable right, and substituted therefore the liability of the Government, and it was held that the Congress intended to secure to the owner of the patent the exact equivalent of that which was taken from him, namely, an enforceable, assignable claim for infringement.

The claims before the Arbiter are asserted under the Act of 1928, which, unlike the Act of 1918, took nothing from the German owner of the patented invention which he then had. On the contrary it conferred upon such German owner rights which had no previous existence and provided a remedy for their enforcement, and the United States assumed the discharge of corresponding obligations. The Act of 1928 provides for determining fair compensation to be paid by the United States for the unauthorized use of German-owned patents *by* the United States and *for* the United States, and makes no distinction between these two classes of claims. Section 3477 of the Revised Statutes applies equally to both.

But this statutory rule prohibiting the assignment of claims against the United States must be construed and applied in the light of the reasons on

[27] Brothers *v.* United States (1919), 250 U. S. at page 89.

[28] Richmond Screw Anchor Company *v.* United States (decided January 3, 1928), 275 U. S. at page 341.

which it rests. If the assignment were of such a nature as not to be within the evil at which the rule is aimed then it is not within the rule.[29] This is the holding of the Supreme Court of the United States in several cases taking assignments out of the prohibition of this statute.[30] These opinions uniformly hold that the purpose of Section 3477 is to protect the Government and not the claimant, and to prevent frauds upon the Treasury,[31] and that the—

> mischiefs designed to be remedied by the statute . . . are mainly two: *First*, The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. *Second*, That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.

Having in mind the purpose of the statute and the mischiefs designed to be remedied, the Supreme Court has held that the statute has no application to transfers by operation of law, the passing of claims to heirs, devisees, or assignees in bankruptcy, the passing of claims through merger or consolidation of corporations, and the like. "The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made."[32]

The Arbiter holds that when one who qualifies as a proper party claimant under the Act appears to assert a claim which otherwise falls within the terms of the Act, and such claimant is one other than the German (or Austrian or Hungarian) owner of the patent in question at the time of its unauthorized use by or for the United States or at the time it was seized or acquired by the Custodian, then the burden will be on the claimant to prove that the claim has passed to and vested in him through involuntary succession, or by operation of law, or as an incident to the forming or the dissolution of a partnership, or the incorporation of a partnership business, or the dissolution of a corporation, or the merging and consolidation of corporations, or the enforced segregation and disposition of corporate assets, and the like. But where it is made to appear that the claimant acquired the claim in question through ordinary barter, purchase, and assignment for speculation or profit subse-

[29] Erwin *v.* United States (1878), 97 U. S. 392, 397; Seaboard Air Line Railway *v.* United States (1921), 256 U. S. 655, 657; Goodman *v.* Niblack (1880), 102 U. S. 556, 560; Western Pacific Railroad Co. *v.* United States (1925), 268 U. S. 271, 275; Price *v.* Forrest (1899), 173 U. S. 410, 422; Houston *v.* Ormes (1920), 252 U. S. 469, 473.

[30] See note 29, *supra*.

[31] Goodman *v.* Niblack, 102 U. S. 556, 560.

[32] Goodman *v.* Niblack, *supra*.

quent to the use by or for the United States on which the claim is based, or subsequent to the time the patent in question was seized or acquired by the Custodian, such claimant will not be entitled to present his claim to the Arbiter.

The Arbiter further holds that where a claimant, whether a natural or juridical person, does not otherwise qualify as a proper party claimant, but through involuntary succession or operation of law, has acquired a claim falling within the terms of the Act from a person, natural or juridical, which latter person meets the requirements of the Act with respect to nationality, then such claimant, standing in the shoes of his predecessor in interest, has a right to assert such claim before the Arbiter.

COMPENSATION FOR USE BY OR FOR THE UNITED STATES

Under paragraph (4) of subsection (b) of Section 3 of the Act, it is the duty of the Arbiter to determine the fair compensation to be paid by the United States in respect of the use by or for the United States of any invention described in and covered by any patent which was conveyed, transferred, or assigned to, or seized by, the Custodian, except use within either of two definite periods which are excluded, (1) between the date of the declaration of war and the armistice, both dates inclusive, or (2) on or after the date on which such patent was licensed, assigned, or sold by the Custodian.

The Arbiter holds that the phrase "use by or for the United States" as found in the Act has the same meaning as the same phrase used in the Act of July 1, 1918,[33] which confers upon the owner of letters patent issued by the United States a remedy by suit against the United States in the Court of Claims when the invention disclosed by the patent is "used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same." The Arbiter holds that the Congress advisedly employed in the Act of 1928 the same phrase which it had employed in the Act of July 1, 1918, and in the light of the construction which the courts of the United States had placed upon it.[34]

The Act of 1918 was primarily a war measure designed to prevent patent-owners, through prohibitive injunctions or otherwise, from interfering with contractors manufacturing for the Government war supplies and materials and to protect such contractors against infringement suits, and at the same time to afford patent-owners protection by substituting the Government's liability for that of the contractor and providing that the exclusive remedy of the patent-owner should be by suit against the United States in the Court of Claims to recover "his reasonable and entire compensation for such use and manufacture." The Supreme Court of the United States has held[35] that the

[33] 40 Stat. 704, 705, amending the Act of June 25, 1910 (36 Stat. 851).

[34] Richmond Screw Anchor Company *v.* United States, decided January 3, 1928, 275 U. S. 331, citing Wood *v.* Atlantic Gulf & Pacific Company (1924), 296 Fed. 718.

[35] Richmond Screw Anchor Company *v.* United States, 275 U. S. at 345.

intention and purpose of the Congress in enacting this statute "was to stimulate contractors to furnish what was needed for the war, without fear of becoming liable themselves for infringements to inventors or the owners or assignees of patents." The statute was enacted in the public interest and in furtherance of the purpose which then had priority over all other purposes, namely, the successful prosecution of the war by the United States and Associated Powers. It was not primarily designed as a measure of protection to patent-owners although they were protected through the substitution of the liability of the Government for that of the private contractors. Bearing in mind the purpose of the Act, it is clear that it was not intended to substitute generally the liability of the Government for that of the contractor, but such substitution was limited to cases in which the Government in the public interest required or directed or requested or expressly approved the use by the contractor for the Government of a patented invention without license of the owner thereof.

To the extent the words of the phrase "use by or for the United States" as found in the Act describe and limit claims otherwise falling within the terms of paragraph (4), the Arbiter holds: (1) that the word "use" means an unauthorized use without license of the owner of an invention disclosed by a patent; (2) that the words "use *by* . . . the United States" mean a direct use of any invention by the Government of the United States through any department or agency thereof; and (3) that the words "use . . . *for* the United States" mean use by a contractor for the Government under a contract which expressly requires, directs, or contemplates the unauthorized use of a patented invention, or which cannot be performed save by the use of such invention, or where the use was with the full knowledge of and on the request of the Government acting through its duly authorized representatives. But the Act does not include use by such government contractor if made without knowledge express or implied on the part of the Government or merely for the convenience or advantage of the contractor himself.

This paragraph (4), dealing with the unauthorized use of patents by or for the United States, expressly limits claims to such as are based on patents which were acquired or seized by the Custodian. All use, whether before or after the date of seizure by the Custodian, up to the date of the disposal of the patent by the Custodian, is embraced within this paragraph, excluding only use between the date of the declaration of the existence of a state of war between the United States and Germany and the date of the Armistice. This is the clear import of the language used. Doubt as to its meaning, if any there were, would be removed by the reports of the Congressional committees having the measure in charge. The Senate Committee in favorably reporting this measure February 9, 1928, had this to say (page 18):

> . . . Many of the patents were used prior to the seizure by the Alien Property Custodian. This class of patents is covered by paragraph (4) of subsection (b). If the patent was ultimately seized by the Alien

> Property Custodian compensation will be paid, for example, for all use, before or after seizure, excluding use between the declaration of war and the armistice, until the patent was disposed of by the Alien Property Custodian. If it was licensed, assigned, or sold to a private party no further compensation by the United States will be paid. If it was licensed, assigned, or sold to the United States, the compensation will be determined under paragraph (3).

Substantially the same language was used in the report of the House Committee of December 15, 1927 (page 15).

The question then arises, What is the earliest date of use upon which a claim before the Arbiter may be based?

As heretofore pointed out the Act deals broadly with war claims. It bears no evidence of any intent on the part of the Congress to deal with claims arising at any time out of peace measures or with claims having their source in occurrences antedating the outbreak of the World War in 1914. Following that outbreak the military arms of the Government of the United States took prompt action to equip themselves to protect the lives and property of American nationals. The records of those departments of the Government indicate that in so doing unauthorized uses were made of inventions covered by German-owned patents. As the world conflagration spread, additional measures of protection and for defense were taken by the Congress. The present military policy of the United States had its origin in the National Defense Act of June 3, 1916. Under it for the first time the mobilization of essential industries was undertaken by the Government of the United States as a part of its national defense. As these activities for defense increased, the unauthorized use of German patents by or for the United States increased.

Germany has been held liable under the Treaty of Berlin for certain claims arising during American neutrality as well as those arising during American belligerency. All were treated by the Mixed Claims Commissions, United States and Germany, as "war claims." The payment of the awards of that commission is provided for in the Act under which the Arbiter is functioning. The Congress had clearly in mind that as between the United States and Germany the "war period" embraced both the periods of American neutrality and of American belligerency, and that claims of the United States and its nationals against Germany embraced claims arising during either of these periods.

The period of use defined by the statute of March 3, 1921,[36] is in effect a legislative declaration that from the outbreak of the World War the use of enemy-owned patents constituted a war use. By that statute it was in substance provided that no claim should be made or action brought in respect of the use of any enemy-owned patents between August 1, 1914, and the date the statute became effective (March 3, 1921), where such use was by the Government of the United States or by any person acting on behalf of, or

[36] 41 Stat. 1313, 1314.

under contract with, or with the assent of the Government of the United States. This statute was enacted prior to the termination of the war. It was essentially a war measure and justified as such. Pending the negotiation and coming into force of the Treaty of Berlin, it afforded protection not only to the Government of the United States but to American manufacturers who, under the pressure of the Government's war requirements, had used enemy-owned patents under the direction, or with the assent, of the Government in producing war materials and munitions. It is permissible for the Arbiter to consider this statute as an aid to arriving at the legislative intent with respect to the *time* of use which constituted war use and gave rise to war claims.

It will also be noted that by the statute of March 3, 1921, the Congress took from the enemy patent-owner the right to recover from the infringing government contractor as well as from the Government itself. The Act of 1928 restores to the ex-enemy patent-owner, as against the Government of the United States, the rights thus taken from him where the unauthorized use of his patent was either by or for the United States and where the United States itself benefited from such use.

The Arbiter holds that the Act empowers him to determine the fair compensation to be paid by the United States in respect of the use by or for the United States of any invention disclosed by any enemy-owned patent acquired or seized by the Custodian, provided such use occurred on or after August 1, 1914, and prior to the disposition of the patent by the Custodian, excluding only such use as occurred between the date of the declaration of war and the date of the Armistice, both dates inclusive.

The counsel for the Government with much earnestness contend that (save for the two periods expressly excluded by the terms of paragraph (4)) there is no limitation with respect to the time of use *by* the United States provided the claim for use was not barred by the statute of limitation of six years at the time of the seizure of the patent by the Custodian; but that a claim for use *for* the United States cannot antedate July 1, 1918, the date on which by an amendment to the Act of June 25, 1910, the United States by statute took from the owner of a patented invention the right to recover directly from an infringing government contractor and substituted therefor an assumption of liability by the Government. The argument is that prior to July 1, 1918, the United States was not liable for the infringement of a patent where the use was not *by* but *for* the United States, and that it was not the intention of the Congress by the Act of 1928 to confer on the German patent-owners rights greater than they would have had under the law in effect at the time of use.

The argument takes no note of the fact that prior to July 1, 1918, the German patent-owner had a clear right to recover from the infringing government contractor. That right was taken from him by the war act of 1921, above noted, and by provisions of the Treaty of Berlin which have hereto-

fore been examined. The Act of 1928 provides for the payment by the United States to the German owners of fair compensation for the infringement of their patented inventions where the use was either by or for the United States; that is, where the United States itself reaped the benefit of such use. The Act makes no distinction with respect to the *time* of use between use *by* the United States and use *for* the United States. The fact that the Act expressly excludes two definite periods strongly indicates an intention not to exclude by implication, not to impose any further limitation with respect to time of use, so long as the claims are "war claims" and so long as the use was by or for the United States Government itself. The argument seeks by implication to import a limitation excluding all use antedating July 1, 1918. Such implication is negatived by the provisions of the statute *expressly* excluding use antedating July 1, 1918, and between that date and April 6, 1917, with respect to German-owned patents, and December 7, 1917, with respect to Austrian and Hungarian-owned patents.

In seizing and taking title to German-owned patents the Custodian generally if not always also expressly seized and took title to all claims for past infringement of such patents. This was a war measure. In some instances the Custodian seized claims for past infringement antedating August 1, 1914, involved in suits against the United States brought by the German owners of such patents, and thereupon, the title to the claim on which such suits were based being in the Custodian, he caused them to be dismissed. They are now barred by limitation. The German owner of the patent has, through a war measure exercised by the Custodian, lost his remedy to enforce his claim against the United States. Such a claim is a war claim and falls within the Act. The Congress has substituted the remedy of claiming before the Arbiter for that which the claimant lost through the war measure taken by the Custodian.

Claims falling within paragraph (4) are claims for the unauthorized use by or for the United States of any invention disclosed by any enemy-owned patent acquired or seized by the Custodian; or in other words, claims for the infringement of such patents. The Act prescribes that with respect to all such claims the United States may urge before the Arbiter any defense, general or special, available to a defendant in a court of the United States in an action of infringement or in any suit in equity for relief against an alleged infringement.

CLAIMS BASED ON USE BY OR FOR THE UNITED STATES OF CHEMICAL FOUNDATION PATENTS

When the Custodian seized and took title to the patents which he afterwards sold and assigned to The Chemical Foundation, Incorporated, he also generally if not always expressly seized and took title to all claims for past infringement of those patents, which included past infringement by or for the United States. But when he came to sell and convey these patents to the

Foundation he expressly excluded from the assignment all claims for past infringement by the United States, save in a few instances in which a comparatively few patents were assigned.

On April 10, 1919, on the date of the first assignment of patents by the Custodian to the Foundation, the Custodian executed and delivered to the United States a release from any and all claims and demands against the United States for profits and damages recoverable at law or in equity for the past infringement of letters patent enumerated in the schedules attached to the instrument of release.[37] The United States paid and the Custodian received no pecuniary compensation for this release. While it appears from the record that the Custodian released to the United States claims for past infringement of most of the patents which he sold and assigned to the Foundation, it is not clear that he released all of them. If he did not the title to these claims remains in the Custodian. But for the purpose of this arbitration it is not material whether the Custodian released to the United States claims against it for infringement or continues to hold them. The material point is that he has not disposed of these claims to the Foundation or to anyone, other than to release most of them at least to the United States.

It was the clear intent of the Act to pay the German owners fair compensation for the unauthorized use by or for the United States of their patents. The United States has declined to avail itself of the release executed by the Custodian to it for which it paid nothing. The intent and purpose of the Act is that the United States shall pay fair compensation for what it took without authority or received directly from the Custodian with respect to German-owned patents.

This being true, it follows that the former German owners of patented inventions described in and covered by any of the patents assigned by the Custodian to the Foundation may, under paragraph (4) of subsection (b) of Section 3 of the Act, assert before the Arbiter claims based on use by or for the United States of such patented inventions. This includes all use by or for the United States from August 1, 1914, to April 5, 1917, both dates inclusive, and from November 12, 1918, to (but not including) the date of the sale and assignment of the particular patent by the Custodian to the Foundation. The first and principal assignment bears date of April 10, 1919. After the title to the patents vested in the Foundation, the unauthorized use if any of the patented invention by the United States, or anyone else, was an infringement of the rights of the Foundation, not of the former German owners, and hence the Congress was at pains expressly to provide that the German claimants were not entitled to compensation under paragraph (4) "after the date on which such patent was licensed, assigned, or sold by the Alien Property Custodian."

[37] Defendants' exhibit No. 85–A, record in Chemical Foundation case, Volume XI, pages 2624–2627.

CLAIMS EMBRACED IN PARAGRAPH (3) OF SUBSECTION (B) OF SECTION 3 OF THE ACT

There is before the Arbiter a group of claims based on German-owned patents which were seized by the Custodian and which were "licensed, assigned, or sold by the Alien Property Custodian to the United States"; that is, the sales, assignments, or grants of license were made *directly* by the Custodian to the United States. All such claims clearly fall within the terms of paragraph (3) of subsection (b) of Section 3 of the Act.

There is also before the Arbiter another group of claims based on licenses granting the United States the right to use inventions disclosed by patents which were German-owned at the time of their seizure by the Custodian, which license was executed and delivered to the United States by The Chemical Foundation, Incorporated, it being asserted on behalf of the claimants that such licenses are in fact *indirect* grants from the Custodian through the Foundation to the United States. Do such licenses fall within the provisions of paragraph (3)? The Arbiter holds that they do not. The reasons for this holding briefly are these:

Paragraph (3) embraces "Any patent . . . which was licensed . . . *by the Alien Property Custodian* to the United States." Had the Congress intended to include all licenses to the United States with respect to patents seized by the Custodian, whether such licenses were direct grants from the Custodian or from private parties claiming under the Custodian, it would have said so. It exercised the greatest care not to reopen any transaction between the Custodian and private persons. The records of the Congress pertaining to this measure abound with evidence of this care, intent, and purpose.

An apt illustration is the action taken in connection with paragraph (2) of subsection (b) of Section 3, which provides that the Arbiter shall determine the fair compensation to be paid by the United States in respect of "Any radio station . . . which was sold to the United States by or under the direction of the Alien Property Custodian." Two radio stations were taken over by the Navy Department of the United States after the outbreak of the World War. The Tuckerton (New Jersey) station was owned by nonenemies but certain German nationals had liens upon it under construction contracts and otherwise. The Custodian seized and later sold these *enemy interests* in the Tuckerton station to a private corporation. In the Senate the bill was so amended as to embrace not only any radio station but also "rights therein" and to eliminate the limiting words "to the United States," thus to include any sale by or under the direction of the Custodian, whether the purchaser was the United States or a private person. The purpose and effect of these amendments was to include in the bill the German interests in the Tuckerton station, which interests had been sold by the Custodian to a private corporation.[38] The conference committee of the two Houses elimi-

[38] See page 3176, Part 3, Volume 69, Congressional Record, 70th Congress, 1st Session; also Report of House Committee, December 15, 1927, pages 5 and 9; Report of Senate Com-

nated these Senate amendments and restored the bill in this respect to the form in which it was received from the House, embracing the Sayville (Long Island) station only, and in this form the bill became a law.

The legal title to the Sayville radio station was vested in an American corporation all of the stock of which was German-owned. The Custodian seized all of this stock, reorganized the corporation, and then through the corporation caused the physical properties of the radio station to be sold to the United States. The Act provides in effect that the Arbiter shall "determine the compensation which should have been paid by the United States for this station,"[39] from which shall be deducted the amount (some $45,000) paid by the United States to the Custodian, which amount under other provisions of the bill will ultimately be paid by the Custodian to the German beneficial owners of this plant.

It will be noted that the Custodian never did seize or sell either the plant of the Tuckerton station or the stock of the corporation owning it, because both were owned by nonenemies. The Custodian did, however, seize and sell to a *private corporation* (not to the United States) the enemy interests in the Tuckerton station. Presumably the Custodian holds the proceeds of the sale of that enemy interest, and under other provisions of the Act the ex-enemy owners of that interest will receive those proceeds.

The point of importance here is that the Congress was at great pains to provide that the Act should not for any purpose reopen or touch or in any way affect this transaction between the Custodian and the private corporation purchasing the enemy interest in the Tuckerton station or in any way deal with the proceeds of the sale of that interest save through the Custodian.

But the situation with respect to the Sayville station is quite different. There the Custodian through seizure controlled all the stock of the corporation in which the title to this station was vested and through such control caused the plant (not the stock) to be sold to the United States. Hence, in pursuance of the intent of the Congress that the United States make fair compensation to the German owners with respect to the property described by the Act which the Government of the United States *itself* took or acquired or which was used by or for it, the Act provides that the Arbiter shall determine the fair compensation to be paid by the United States to the German nationals who were the beneficial owners of this Sayville station at the time of seizure by the Custodian. In making this compensation, notwithstanding the absence of any legal obligation so to do, the United States to this extent—but to this extent only—waives the provisions of the Treaty of Berlin.

In dealing with this radio station (Sayville station) which the Custodian had *caused to be sold* to the United States through an American corporation

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mittee of February 9, 1928, pages 2, 3, 15, and 16; Statement of Managers on the part of the House at the Conference, February 27, 1928, page 30.

[39] House Committee Report of December 15, 1927, page 9.

which he controlled through the seizure of German-owned stock therein, apt language was used in paragraph (2) accurately to describe the transaction:

> Any radio station . . . which was sold to the United States by *or under the direction of* the Alien Property Custodian.

This describes an indirect sale to the United States by the Custodian. The use of this language in paragraph (2) seems to negative the intent on the part of the Congress to include in paragraph (3) licenses *indirectly* granted by the Custodian to the United States.

In seeking out the intent of the Congress, to give effect to which is the Arbiter's duty, he may look to the formal reports of the legislative committees having the measure in charge.[40] As heretofore pointed out, the office of the Arbiter was created by the Congress for a special purpose. His jurisdiction is limited to determining the fair compensation to be paid by the United States in respect of four distinct categories of claims described by the Act. Where there exists any doubt with respect to the claims which the Congress intended to include in any one of those categories the rule permitting recourse to legislative reports to determine the intent of the law-making body applies with peculiar force, because the Congress was dealing with existing claims based on past transactions of the general nature and history of which it must be presumed the Congress had knowledge, and was not undertaking to define the jurisdiction of a tribunal with respect to classes of claims that might arise out of future transactions.

Looking to the reports of the committees of both Houses of the Congress having this measure in charge, it appears that in enacting paragraph (3) the Congress had in mind a particular group of patents which were licensed, sold, or assigned by the Custodian *directly* to the United States. In the report of the Senate Committee of February 9, 1928, at page 18, under the caption "Claims of German Nationals against United States" this language was used:[41]

> In the case of patents described in paragraph (3) of subsection (b) of Section 3, which were licensed, sold, or assigned by the Alien Property Custodian to the United States, an aggregate amount of approximately $105,000 was paid by the United States to the Alien Property Custodian and is still held by him, unallocated to any particular patent. In order to relieve the Alien Property Custodian of allocating this amount, it is provided . . . that the custodian shall return this amount to the United States and that the arbiter will determine and award the full compensation. . . .

At page 32 of the same report it is said:

> As explained above, the United States paid approximately $105,000 to the Alien Property Custodian on account of the patents which were

[40] See references to authorities in note 7, *supra*.

[41] Substantially the same language is found in the report of December 15, 1927, of the House Committee at page 15.

> licensed, sold, or assigned by him to the United States. This amount was arbitrarily arrived at, and no attempt has been made to allocate it among the patents. The simplest procedure is to provide for the return of this amount to the United States, in order to permit the arbiter to determine the consideration which should be paid and to disregard this amount. Section 27 of the bill so provides.

It will be noted that this language refers to patents "*described*" in paragraph (3) as those "which were licensed, sold, or assigned by the Alien Property Custodian to the United States" and for which "an aggregate amount of approximately $105,000 was paid by the United States" to the Custodian. These transactions are readily and definitely identified and embrace only patents which were *directly* licensed, sold, or assigned by the Custodian to the United States by instruments in writing executed by the Custodian.

These reports strongly indicate that the Congress intended to *describe* by the language of paragraph (3) only a particular group of patents which were *directly* licensed, sold, or assigned by the Custodian to the United States evidenced by instruments in writing executed by the Custodian, and did not intend to include in paragraph (3) grants of licenses to the United States directly from private persons, natural or juridical, claiming by purchase from the Custodian, even though the grant was made by such private persons at the request or on the suggestion of or because of an obligation to the Custodian. These committee reports confirm the construction of the statute resulting from giving to the words used their natural and ordinary signification, and also resulting from the significant difference in the language of paragraph (2), which embraces any radio station sold "by *or under the direction of* the Alien Property Custodian" to the United States, from that of paragraph (3), which deals only with patents "licensed, assigned, or sold by the Alien Property Custodian to the United States."

CLAIMS BASED ON LICENSES UNDER CHEMICAL FOUNDATION PATENTS

In view of their number and importance, the Arbiter will here examine in some detail the group of claims put forward by German nationals seeking compensation for patents or licenses thereunder, which patents were German-owned when seized by the Custodian and which were by him sold and assigned to The Chemical Foundation, Incorporated (a Delaware corporation hereinafter designated "Foundation"). While the Foundation is not directly concerned in these claims, these patents will, for convenience, be referred to as "Foundation patents."

On behalf of these claimants it is contended in substance that the Foundation was created under the direction of the officials of the Government of the United States as an instrumentality to effect the disposition and subsequent control in the public interest of the patents in question; that the Foundation is in effect a public trust created for the benefit of the nation; that the sale

and assignment by the Custodian to the Foundation of German-owned patents seized by him was in fact a vesting of title to such patents in the "people of the United States"; that the "people of the United States" are the "United States" as that term is used in paragraph (3) of subsection (b) of Section 3 of the Act; and that therefore all patents sold and assigned by the Custodian to the Foundation fall within those provisions of the Act which make it the duty of the Arbiter to hear and determine fair compensation to be paid by the United States in respect of "Any patent . . . which was licensed, assigned, or sold by the Alien Property Custodian to the United States."

The Arbiter rejects this contention. The Foundation was created as and is a private corporation. Assuming, without holding, that the patents held by the Foundation are impressed with a public trust, there is nothing in the organization of the Foundation remotely to suggest identity between it and the "United States" as that term is used in the Act. While it was created on the initiative of and under the supervision of those who were at the time officers and agents of the United States, it is in no sense an integral part of or an agency of the Government of the United States. In a suit brought by the Department of Justice of the United States acting under instructions of the President, the Supreme Court of the United States [42] held that the title to the patents here under consideration vested in the Foundation through the sale and assignment to it by the Custodian; that such sale was not tainted with fraud but had been made in pursuance of the lawful provisions of the Trading with the Enemy Act; and that the United States was powerless to set aside that sale or to disturb the valid title of the Foundation. Far from being embraced in the term "United States" as used in the Act, or occupying any niche in the structure of the Government of the United States, it is apparent that the Foundation is independent of and in no sense a part of that Government. That the government officials on whose initiative and under whose supervision the Foundation was created never intended that it should be a government agency is clearly evidenced by the fact that when the Custodian came to sell and assign patents to the Foundation he sought the approval of the President in pursuance of that provision of Section 12 of the Trading with the Enemy Act as amended [43] which required that all property sold by the Custodian should be sold only to American citizens at public sale to the highest bidder "unless the President stating the reasons therefor, in the public interest shall otherwise determine." Sales made by the Custodian to the United States were expressly excepted from this provision. They were not regulated.[44] Had the private sale to the Foundation been a sale to the United States there would have been no occasion for the Custodian seeking and procuring the approval of the President or his deputy,

[42] United States v. Chemical Foundation, Inc. (1926), 272 U. S. 1.
[43] 40 Stat. 460 (Act of March 28, 1918).
[44] United States *v.* Chemical Foundation, Inc., 272 U. S. 1, 12.

Mr. Frank L. Polk. Yet the sufficiency of this approval was one of the sharply controverted issues in the litigation between the United States and the Foundation, and no counsel or court ever suggested that this private sale could have been made without such approval. The sale to the Foundation cannot under any torture of construction be held to be a sale to the "United States" as that term is used in the Act.

As heretofore pointed out, under the Treaty of Berlin this sale by the Custodian to the Foundation is final and binding upon all persons whomsoever, including the German former owners of these patents, their interest in which is limited ultimately to receiving through the Custodian the proceeds of the sale as provided by the Act of 1928. It will be recalled that the Congress exercised the greatest care not to touch or in any way interfere with any of the transactions of the Custodian vesting in private persons any title or interest in property. The "Foundation patents" were left just where the Supreme Court of the United States left them—in The Chemical Foundation, Incorporated—to the extent that it acquired title or interest therein from the Custodian. But the question arises:

Under the decision of the Supreme Court of the United States what title or interest in these patents in fact vested in the Foundation?

The suit of the United States of America *v.* The Chemical Foundation, Incorporated,[45] was at the direction of President Harding brought by the United States in a district court of the United States to set aside sales of letters patent issued by the United States which were seized by the Custodian and by him sold and assigned to the Foundation, on the ground that the Foundation procured the assignment of these patents to it through the fraudulent deception of President Wilson, his deputy, Mr. Polk, and other officials of the Government. The answer of the Foundation denied conspiracy and fraud and averred that through its purchase in good faith for a valuable and adequate consideration the title to the patents had vested in it. The issue of value and adequacy of consideration was sharply raised by the pleadings. The answer of the Foundation expressly averred that in addition to the cash consideration paid by it to the Custodian a further condition and consideration *moving from the Foundation to the Custodian*[46] was that the Foundation "should license the United States in such manner as to grant to it during the life of each and all said patents, the right, free of charge, to make or have made for its own use and to use the several processes and products covered by said patents," etc. The Foundation further alleged that "In conformity with the terms of sale" it executed and delivered to the United States and the latter accepted a license under said patents. The truth or falsity of these averments constituted a material issue in the case in connection with which much testimony was adduced. They were

[45] United States *v.* Chemical Foundation, Inc. (1924), 294 Fed. 300 (1925), 5 Fed. (2d) 191 (1926), 272 U. S. 1.

[46] Court record, Volume 1, pages 540–541.

supported by the testimony of Mr. Polk, who acted as the President's deputy in signing the Executive Order authorizing the Custodian at private sale to sell to the Foundation; by the testimony of A. Mitchell Palmer, who, as Alien Property Custodian, authorized the sale; by that of Francis P. Garvan, who, as Alien Property Custodian, consummated the sale; and by that of Joseph H. Choate, Jr., who, as counsel for the Custodian, participated in the negotiations for and the consummation of the sale. The voluminous record discloses some testimony, mainly circumstantial in its nature, tending to rebut the positive testimony of these witnesses.

There was no express reservation of a license to the Government of the United States in the several instruments of assignments of patents by the Custodian to the Foundation. On the contrary the principal instrument of assignment by the Custodian to the Foundation under date of April 10, 1919, in terms assigns "the whole right, title, and interest acquired by" the Custodian "without any reservation or qualification whatsoever, whether by reason of anything contained in the charter or bylaws of the said the Chemical Foundation (Inc.), or otherwise, and subject only to the provisions of a certain release to the United States of America, bearing even date herewith." The release mentioned released the United States from all claims on account of past infringement of these patents.[47] As explained by the testimony of Mr. Garvan and others, it appears that this broad language was incorporated in the instrument of assignment by Mr. Hoguet, patent counsel for both the Custodian and the Foundation, who held the opinion that in order to cut off any claim of the German owners after the war, and to enable the Foundation successfully to prosecute claims of infringement, the conveyance should be absolute and unconditional and vest in the Foundation the patents as a whole comprising the exclusive right to make, use, and vend the inventions throughout the United States.[48] Mr. Garvan testified, however, that the Foundation was "Absolutely obligated to give a license to the Government,"[49] and that the all-inclusive language of the assignment was not intended to and did not in fact affect such obligation. An instrument of release and license embracing all of the patents acquired by the Foundation from the Custodian was prepared by the Foundation in collaboration with the Navy Department of the United States, was executed by the Foundation under date of November 17, 1921, and on December 27, 1921, was formally "accepted according to the terms and conditions thereof" by "The Government of the United States of America by Theodore Roosevelt, Jr., The Acting Secretary of the Navy." After referring to the sales made by the Custodian to the Foundation it recites that—

> Whereas, The Foundation, among other things, is obligated by the terms and conditions of the aforementioned sales to it by said Alien Property Custodian . . . to grant to The Government, free and with-

[47] Court record, pages 2624–2627. [48] *Ibid.*, page 2822.
[49] *Ibid.*, pages 2993 and 3022.

> out cost, a non-exclusive and non-assignable license to make, use and sell the inventions covered by any and all Letters Patent and applications therefor owned or controlled by it;
>
> . . . . . .
>
> Now, Therefore, In consideration of the premises . . . The Foundation . . . hereby grants to The Government, upon the terms and conditions hereinafter set forth, without payment of any further consideration, royalty or license fee whatever, a non-exclusive and non-assignable license—

to use any and every invention under the patents in question.

This document was filed and recorded in the Patent Office of the United States as evidence of the right of the United States to use the inventions disclosed by the patents described therein. The United States, by virtue of this license, has since asserted and continues to assert the right to use these inventions. It has never paid to anyone any pecuniary consideration therefor.

The District Court dismissed the complaint.[50] Its decree was affirmed by the Circuit Court of Appeals,[51] and on appeal to the Supreme Court of the United States the decree (save with respect to a minor matter of costs) was again affirmed.[52] With respect to the issue of adequacy of consideration the District Judge held that one of the "conditions of sale" was "that the United States should receive free licenses." [53] On this issue the Circuit Court of Appeals held that one of the conditions of the sale was "that the Government should have free non-exclusive licenses for all governmental purposes under all the patents."[54] That court, in commenting on the performance by the Foundation of "the trusts imposed by the sale," referred to the fact that—

> *it granted the United States free licenses* for all government purposes under all the patents it had acquired.

The court further held:

> By authority of the Act [Trading with the Enemy Act], which means by authority of Congress, the patents were sold . . . *on conditions* that the United States should have free licenses under all of them and that its citizens should have non-exclusive licenses on equal terms. These, briefly, were the conditions. What did the United States receive? It received the $250,000; *it also received licenses under the patents* . . .

The Supreme Court of the United States, after pointing out that the Government insisted that the orders of Mr. Polk, acting as the deputy of the President in approving the sale by the Custodian to the Foundation,

[50] United States *v.* Chemical Foundation, Inc. (1924), 294 Fed. 300.
[51] United States *v.* Chemical Foundation, Inc. (1925), 5 Fed. (2d) 191.
[52] United States *v.* Chemical Foundation, Inc. (1926), 272 U. S. 1.
[53] United States *v.* Chemical Foundation, Inc., 294 Fed. 300, 303.
[54] United States *v.* Chemical Foundation, Inc., 5 Fed. (2d) 191, 202.

"were induced by misrepresentation and were made without knowledge of the material facts," adds—

> But both courts found that the United States failed to establish any conspiracy, fraud or deception alleged. Findings of fact concurred in by two lower courts will not be disturbed unless clearly erroneous. . . . Under this rule the findings must be accepted.

It is apparent that the Supreme Court of the United States, affirming decrees of the District Court and the Circuit Court of Appeals in the suit brought by the United States against the Foundation, has in effect held that one of the conditions of the sale of patents by the Custodian to the Foundation was that the Foundation should grant to the United States free licenses under all of the patents it acquired from the Custodian and that the Foundation had fulfilled this condition of the sale and discharged its obligation thereunder by granting such licenses to the United States.

The contentions put forward by counsel in support of these claims will be examined in the light of this record. Those contentions briefly stated are:

(1) The Custodian through oral grant in conference with the President and his deputy, Mr. Polk, licensed the patents in question to the United States.

(2) The sale and assignment to the Foundation was made subject to this oral license.

(3) The Custodian, in making the sale and transfer to the Foundation, reserved for the use and benefit of the United States the right to use the inventions disclosed by these patents.

(4) The sale and assignment of the patents by the Custodian to the Foundation was coupled with an obligation on the part of the Foundation to grant free licenses to the Government, which obligation was a part of the consideration moving the Custodian to make the sale and assignment.

(5) In pursuance of the terms and conditions of the sale and assignment the instrument of release and license from the Foundation to the Government dated November 17, 1921, was executed and delivered by the Foundation and accepted by the Government.

The argument in support of these contentions is substantially this:

Letters patent from the United States, although in form a grant to make, use, and sell, are in legal effect merely a grant of the *right to exclude* or to prevent or restrain the use of an invention for the manufacture, use, or sale; that a license under a patent is a *pro tanto relinquishment* of the right to exclude and an agreement not to sue or disturb the licensee in the practice of the invention disclosed by the patent; that a contract for a license is enforceable as a license even though a formal license may not have been executed and delivered or even though the owner of the patent may have declined to execute and deliver a formal license in pursuance of the contract;[55] that a license or a contract therefor may be oral or written or may be implied from

[55] American Paper-Bag Co. *v.* Van Nortwick (1892), 52 Fed. 752.

circumstances;[56] that if reduced to writing the instrument is merely evidence of the existence of the right to use.[57]

Applying these rules to the evidence in the Chemical Foundation case, the claimants deduce that at the time of the approval of the sale by the Custodian to the Foundation the Custodian agreed with the President, through his deputy, Mr. Polk, that the Government was to have a free license to use the inventions covered by all the patents in question; that on the faith of this agreement the sale was approved and consummated; that the Foundation purchased with full knowledge of this agreement which was binding on all parties in interest and that under it the Government of the United States had the right to use the patents in question; that there never was a time when the Foundation had the right to exclude the United States from using these patents, and that, quite independent of any license from the Foundation to the United States, the Foundation could not maintain a suit for infringement against the United States for the use by it of these inventions.

There is nothing in the records to indicate that these contentions now urged upon the Arbiter were considered by the Congress when this measure was pending before it. The Federal courts had held that the licenses enjoyed by the United States were granted to it by the Foundation, and there is nothing in the records to indicate that it ever occurred to the Congress that the Custodian might have made an oral grant to, or reserved for the use and benefit of, the United States the right to use the patented inventions, or that the Foundation took these patents subject to a license to the United States. The record in the Chemical Foundation case indicates, and the Federal courts have held, that, while it was understood that the United States should have a free license to use the inventions covered by these patents, it was agreed that the whole of the patents should vest in the Foundation and that *the Foundation, not the Custodian, should carve therefrom and pass to the United States the grant of a license thereunder.* In pursuance of these understandings and agreements the instrument of assignment from the Custodian to the Foundation used broad and apt language to vest the whole of the patents in the Foundation without any reservations whatsoever, and without indicating any license to the Government carved out of them. But while not expressed in the instrument of assignment it was understood between the interested parties that a condition and a consideration moving from the Foundation to the Custodian was an *obligation of the Foundation* to grant free licenses to the United States covering all these patents. The instrument of release and license dated November 17, 1921, executed by the Foundation and accepted by the United States, shows on its face that it was executed, delivered, and accepted in pursuance of these terms and conditions

[56] St. Louis Street F. M. Co. *v.* Sanitary Street F. M. Co. (1910), 178 Fed. 923, 926; Cook *v.* Sterling Electric Co. (1907), 150 Fed. at 769; Jones *v.* Berger (1893), 58 Fed. 1006.

[57] Union Switch & Signal Co. *v.* Johnson Railroad Signal Co. (1894), 61 Fed. 940, 944.

of the sale and was given in discharge of the *Foundation's obligation* thereunder.

The form of the transaction is significant in searching out and determining the intent of the parties thereto. The record in the Chemical Foundation case indicates that the Custodian did not intend to, and in fact did not, orally or impliedly *directly* grant a free license to the United States. On the contrary he was at pains not to do so. He was at pains not to make any reservation whatsoever but used apt language to negative any reservation and to vest the whole of the patents in the Foundation. When Mr. Polk, as the President's deputy, approved the sale by the Custodian to the Foundation it was with the understanding—not that the patents were to be sold subject to a license granted by the Custodian to the United States, or reserved by the Custodian for the United States—but that the *Foundation* was to be *obligated to grant* free licenses to the United States.[58]

But looking through the form to the substance, the effect of this transaction was that while the Foundation took from the Custodian title to the whole of the patents, it took them burdened with an obligation to grant free licenses to the United States to use the inventions disclosed by them. The weight of this burden was taken into account by both the District Court and the Circuit Court of Appeals in reaching the conclusion that the Foundation paid an adequate consideration for what it got, and the Foundation, a private corporation, not the Custodian, discharged this burden by granting a free license to the United States.

For the reasons heretofore pointed out [59] the Arbiter finds that the Congress did not intend to include, and did not in fact include, such licenses within the terms of paragraph (3) of subsection (b) of Section 3 of the Act. Had the Congress seen fit to have provided for the payment of fair compensation to the German former owners of these patents for such rights thereunder as the United States *itself* got, leaving undisturbed the Foundation's title with the free license to the United States carved out of it, such provision would have been in entire harmony with the purposes of the Act, and not in conflict with the opinion of the Supreme Court of the United States in the Chemical Foundation case. But the Congress has not so provided. While it is true that so far as disclosed by the records the propriety of the United States paying, not for the whole of the Foundation patents, but for its license to use them, which it enjoys but for which it has never paid, was not considered by the Congress, nevertheless it is not for the Arbiter to speculate with respect to the course the Congress would have pursued had this phase of the transaction been called to its attention. Much less can the Arbiter by a construction through implication extend his jurisdiction to include a class of claims which the Congress had not clearly placed there. It follows that this group of claimants must seek their remedy, if any, through the Congress.

[58] Volume II, Court record, pages 1259–1260. [59] See page 30, *supra*. [Page 218, herein.]

The foregoing is expressly limited to claims arising under paragraph (3) based on licenses to the United States. As heretofore held, it does not affect claims arising under paragraph (4) based on use by or for the United States of inventions disclosed by patents assigned by the Custodian to the Foundation where such use occurred between August 1, 1914, and April 6, 1917, or between November 11, 1918, and the date of assignment of the particular patent by the Custodian to the Foundation. It will be recalled that the Congress was at pains expressly to provide that the German claimants were not entitled to compensation under paragraph (4) "after the date on which such patent was licensed, assigned, or sold by the Alien Property Custodian."

VALIDITY OF PATENTS IN CLAIMS BASED ON LICENSES TO THE UNITED STATES

With respect to a license granted by the Custodian to the United States, the claimants' counsel deny the right of the United States to challenge the validity of the patent under which such license was granted, and invoke a rule of American patent jurisprudence to the effect that a licensee will not be heard to deny the lincesor's title or the validity of the patent.[60]

The Arbiter rejects this contention because: (1) It is the duty of the Arbiter to determine the fair compensation to be paid by the United States for what it got, and this requires an inquiry and a finding by him of what the United States in fact got. (2) The rule invoked has its source in the doctrine of estoppel which has no application to the facts in any case before the Arbiter.

The licenses granted by the Custodian to the United States are dealt with in paragraph (3) of subsection (b) of Section 3 of the Act. These are the licenses described in the reports of the committees of Congress and definitely identified as the licenses for which the United States paid to the Custodian an aggregate amount of approximately $105,000. In the language of the report of the Senate Committee:

> . . . *This amount was arbitrarily arrived at,* and no attempt has been made to allocate it among the patents. The simplest procedure is to provide for the return of this amount to the United States, *in order to permit the arbiter to determine the consideration which should be paid and to disregard this amount.* Section 27 of the bill so provides.

While the consideration stipulated for in the license has been paid in full, the United States has voluntarily elected to set aside the transaction and permit the German nationals to assert their claims before the Arbiter in order that he may *de novo* ascertain what the United States really got and determine fair compensation therefor. The Act provides that "Such compensa-

[60] Kinsman et al. *v.* Parkhurst (1856), 59 U. S. (18 Howard) 289, 293; Birdsall *v.* Perego (1865), 5 Blatchford 251, 255; Clark *v.* Amoskeag Manufacturing Co. (1883), 62 New Hampshire 612, 615; Jones *v.* Burnham et al. (1877), 67 Maine 93, 97; Moore *v.* National Water-Tube Boiler Co. (1897), 84 Fed. 346, 347; Marsh *v.* Harris Mfg. Co. (1885), 63 Wisconsin 276, 283.

tion shall be the amount . . . which would have been paid if such patent . . . had been licensed . . . to the United States by a citizen of the United States." Each claim, each patent, must be examined and the Arbiter must determine what amount would have been paid at the time of the license by the Custodian had a citizen of the United States offered to the Government a license to the patent in question. At the threshold the Arbiter must inquire and determine what had a citizen of the United States tendering such a license to offer? Had he a title to a valid patent which the Government desired to use? If so, a license from him would have value to the Government, the amount of which must be fixed by the Arbiter. But if the Arbiter on competent evidence should find the patent invalid, it cannot be that the rule of fair compensation will require the United States to pay for something it had a perfect right to use without paying anything. The Government of the United States has seen fit in the interest of the ex-enemy patent-owners to reopen the transaction under which it acquired licenses from the Custodian, in order that such patent-owners in receiving back their patents burdened with licenses to the United States shall, in addition to the patents, receive from the United States the fair value of such licenses. In effect the bargain between the patent-owners and the United States is just now being struck. The patent-owners are asserting rights created by the Act and pursuing remedies provided by the Act. Up to this time there has been no agreement to pay anything to the patent-owners. The amount to be paid is now for the first time to be determined. When that amount is placed in the scales for measuring fair compensation it should exactly balance what the United States actually received placed in the other side of the scales. Manifestly the amount cannot be determined without first ascertaining what the United States actually received.

The same result is reached by considering the reason of the rule invoked and urged upon the Arbiter by claimants' counsel. That rule has its source in the doctrine of estoppel. An estoppel by contract arises from admissions of fact, express or implied, on which another has acted, and closes the mouth of him making the admissions to assert and prove the truth after he has benefited under the contract. In such cases there can be no estoppel in the absence of a clear agreement or admission, express or implied, by him seeking to deny the truth of the controverted fact. Putting it another way: "estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself." [61] The cases in which it has been applied usually have been those in which a patentee was seeking to enforce the payment of royalties which the licensee had definitely agreed to pay. In such cases the rule of estoppel has been applied to close the mouth of the licensee to deny the admissions, express or implied, made by him that the patent was valid, that the title was in the licensor, and that the licensee was bound to pay in conformity with his

[61] Lindley, L. J., in Low *v.* Bouverie, L. R. (1891), 3 Ch. 82, 101.

definite agreement. Having reaped all the benefits and profits from such use, the courts have held, the licensee is estopped to deny the admissions made by him on which the transaction was based.

But the Arbiter has no such case before him, and where, as here, the reason does not exist which supports the rule of estoppel the rule itself will not be applied.

In the instruments evidencing the grant of license by the Custodian to the Government of the United States (June 1, 1920, and December 20, 1920), it is recited that—

> . . . neither the Alien Property Custodian, nor any representative or agent or agency thereof shall be held or *admitted* to have made any *representation or guaranty, express or implied,* concerning or in any way respecting the aforesaid letters patent, rights, licenses, damages and profits herein granted or assigned or intended so to be.

Far from warranting the title or making representations with respect to the validity of these patents, the Custodian was at pains clearly to state that the grant of license was made by him without any representation or guaranty, express or implied, of any nature whatsoever. Neither for himself nor anyone claiming under him did he agree to protect the United States as licensee in the use of the inventions disclosed by the patents. It is clear from the record that the agencies of the Government did not, as is usual, cause careful search to be made by patent experts to determine the validity of the patents preliminary to their acquisition. On the contrary, the record discloses that the Secretary of the Navy notified the Custodian in writing that it would be impracticable to make such searches. Therefore it was agreed that a blanket license should be given and accepted. The Custodian held whatever title the German former owners had to these patents, whether valid or invalid. The blanket license granted by him to the United States was in effect a quitclaim to use what he had, no more, no less. He made no representations concerning the validity of the patents. The United States in accepting the license did not expressly or impliedly admit the truth of representations which were never made. It had no protection in the form of warranties or guaranties from the Custodian or those claiming under him against suits for infringement by third parties asserting the invalidity of these patents. It admitted or agreed to nothing save to bind itself to the Custodian, its licensor, to pay the lump sum and purely arbitrary price which it did pay for blanket licenses to a large number of patents, for some of which at least the record indicates it had no use and concerning which its information and that of the Custodian was very limited. The United States has discharged every obligation that it has undertaken. The mere possession of a license does not estop one from attacking its validity. It is the possession of the license under an agreement with the licensor which estops one *who has not fulfilled the terms of that agreement* from pleading and proving the invalidity of the subject thereof in order to avoid liability for

breach of his contract. The United States has broken no contract. It has never had any with the ex-enemy nationals who appear here as claimants. They are here pursuing a remedy in respect to rights created by the Act because the Congress, in the declaration of a national policy, determined that the United States should make fair compensation for such enemy property as it took or received for its own use and benefit. It is inconceivable that the Congress intended through operation of the doctrine of estoppel, or otherwise, to pay the ex-enemy nationals for a grant to use that to which they never had title and which was valueless because of the invalidity of the patent under which the grant was made.

The Arbiter holds that the doctrine of estoppel invoked by the German claimants has no application as against the United States in this group of cases [62] and that, to enable him to determine the fair compensation to be paid by the United States for the license to a particular patent, the validity of the patent and the claimant's title thereto may be challenged by the Government and inquired into by the Arbiter.[63]

TRADEMARKS

Numerous claims are pending before the Arbiter for alleged use by the United States of trademarks owned by the claimants. The Arbiter holds that such claims are not embraced within the terms of the Act and not within his jurisdiction.

[62] A like rule was announced by the United States Court of Claims in Zeidler *v.* United States (1926), 61 Court of Claims Reports, at 553–554. There the claimant sought to recover under the Act of October 6, 1917 (40 Stat. 394), a war measure, for alleged use of his invention during the war by the Government of the United States. As a measure of public safety or defense the issuance of letters patent was withheld and an order of secrecy issued. Letters patent were subsequently issued to Zeidler February 15, 1921. Among other defenses the Government alleged and sought to prove the invalidity of the patent, which was met with the contention that no defense of invalidity could be raised by the Government which, it was contended, in issuing the secrecy order and subsequently issuing the patent, had under the Act recognized the validity of the patent and agreed to make compensation for its use thereof from the date of such use. Unlike the Acts of 1910 and 1918, the Act of October 6, 1917, under which the Zeidler suit was brought, does not in terms reserve to the United States the usual defenses of a defendant in an infringement suit. The Court of Claims, however, held that the Government was not estopped to prove invalidity and applied the prior art to the patent and held it invalid. In the course of the opinion this language was used:

"Why should the Government estop itself from resorting to legitimate defenses at a time when prospective inventors were extremely active and insufficient time prevailed to investigate with care and caution the exact legal status of the situation?"

[63] It is interesting to note that under the terms of the Trading with the Enemy Act provision is made for the payment "after the end of the war" to "the owner of any patent" for all use and enjoyment thereof under licenses issued by the Federal Trade Commission. But it is provided "That the licensee may make any and all defenses which would be available were no license granted." (Subsection (f) of Section 10 of the Trading with the Enemy Act.) This suggests an established policy on the part of the Government not to bind a licensee under a government agency by the ordinary rule of estoppel as against a licensee.

In omitting all mention of trademarks the Congress acted advisedly. That the omission was not due to inadvertence is made clear by considering the nature of a trademark. In effect it is any mark which, by association with goods, has come to distinguish the goods of one trader from those of another. It is a symbol of reputation—visible reputation. It cannot exist save in connection with an existing business.[64] When a trademark is pirated it is not the mark that is infringed but the right of the owner of the mark to his trade and custom, based upon the reputation of his products which the mark merely identifies. The wrong does not consist of the imitation of a mark but the stealing of trade, custom, and good-will based on reputation belonging to another through fraudulently inducing the purchase of goods under a mistaken belief that they are the products of another.

Obviously the Government of the United States has not pirated any trademark. It does not engage in trade or commerce or sell goods, wares, or merchandise on the open market save in those comparatively rare instances where it sells surplus property purchased or produced for its own use. Manifestly the Congress had no intention of declaring that the Government had resorted to misrepresentation or had practiced fraud such as would be implied in providing compensation for the infringement of trademarks.

Counsel for the claimants and for the Government of the United States will collaborate in preparing and filing stipulations in writing identifying the claims or parts of claims based wholly on the alleged use of trademarks by the United States, on which stipulations orders of dismissal will be entered by the Arbiter.

FEDERAL TRADE COMMISSION LICENSES

Several questions have been presented to the Arbiter with respect to claims based on patents, licenses under which were issued by the Federal Trade Commission. In order to answer these questions a clear understanding of the terms and conditions under which such licenses were issued by the Federal Trade Commission is essential.

Section 10 of the Trading with the Enemy Act as originally enacted clothed the President with authority "to grant such a license, non-exclusive or exclusive as he shall deem best," to use any patent owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war. The Act provided that "Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent . . . against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof." Provision was made for the payment by the licensee to the Custodian of license fees or royalties established by the President, the sum so paid to be

[64] Hanover Star Milling Company *v.* Metcalf (1916), 240 U. S. 403; Hicks *v.* Anchor Packing Company (1926), 16 Fed. (2d) 723.

deposited by the Custodian "in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, . . . to be paid from the Treasury upon order of the court, as provided in subsection (f) of this section." Subsection (f) of Section 10 provided for the filing of a bill in equity against the licensee in a District Court of the United States, such suit to be filed by the owner of the patent within one year after the end of the war for "recovery from the said licensee for all use and enjoyment of the said patented invention." To such suit the Treasurer of the United States should be made a party and the Custodian should be given notice within thirty days after the entry of the suit—

> *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee . . .

Provision was further made that the court before which the suit was brought may terminate the license or "may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable." The Act of 1928 amended subsection (f) of Section 10 by adding thereto the following:

> In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred, or delivered to the Alien Property Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trade-mark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label, or copyright was seized or otherwise acquired by the Alien Property Custodian.

The President by executive order delegated to the Federal Trade Commission the exercise of the powers of license under Section 10 of the Trading with the Enemy Act. A number of such licenses were issued by the commission to American citizens under which there was considerable production, and substantial amounts of money were paid thereunder by the licensees to the Custodian and by him deposited in the Treasury of the United States. None of these licenses was granted to the Government of the United States and the Federal Trade Commission made no reservation or grant of interest to the United States in the licenses which it issued to private persons. Use by the licensees of the inventions covered by these patents was a lawfully authorized use.

Some or all of the patents under which the Federal Trade Commission

had issued licenses were seized by the Custodian subject to such licenses. In seizing and taking title to the patents the Custodian also seized and took title to the rights of the patentee arising under the licenses issued by the Federal Trade Commission, including accrued royalties.[65]

In the light of the foregoing statement it is apparent that there can be no claim against the United States falling within the provisions of paragraph (3) of subsection (b) of Section 3 of the Act based on licenses issued by the Federal Trade Commission.

It is equally clear that there can be no claim against the United States falling within the provisions of paragraph (4) of subsection (b) of Section 3 of the Act based on the use by or for the United States of products manufactured under such licenses. To the extent, if any, that the Government of the United States may have made purchases of articles produced by Federal Trade Commission licensees under these patents, or to the extent, if any, that a contractor for the United States may have made such purchases, they were vendees of a duly authorized licensee and such purchases and use could not possibly give rise to any claim against the United States.

The German, Austrian, and Hungarian owners of patents licensed by the Federal Trade Commission have been afforded through recourse to the District Courts of the United States an adequate remedy for the recovery of compensation for the use of their patents made under such licenses. Such recourse has been had in numerous cases, some of which are still pending. With the compensation which the owner of the patent may recover through those suits the Arbiter has nothing to do. If, in pursuance of the provisions of subsection (f) of Section 10 of the Trading with the Enemy Act as amended, the Custodian should recover in suits brought by him against licensees under Federal Trade Commission licenses for use prior to sales made by the Custodian of the patents under which licenses were issued, then the amounts so collected by the Custodian will ultimately be paid to the German, Austrian, or Hungarian owners of the patents in pursuance of the provisions of the Act of 1928.

The Arbiter holds that he has no jurisdiction over *claims based on licenses* issued by the Federal Trade Commission.

But the Arbiter further holds that if, with respect to any patent under which the Federal Trade Commission issued a license, it is made to appear (1) that such patent was subsequently seized by the Custodian subject to the Federal Trade Commission license and that the Custodian directly licensed, assigned, or sold to the United States the patent so seized or (2) that there was use by or for the United States of the invention disclosed by any such patent, which use was not under the Federal Trade Commission license but was an unauthorized use, then in either event the owner of such patent at the time of seizure by the Custodian, qualifying as a proper party claimant, may assert his claim therefor before the Arbiter.

[65] Hicks *v.* Anchor Packing Company (1926), 16 Fed. (2d) 723.

APPLICATION OF DECISION

This decision in so far as applicable will control the preparation, presentation, and decision of all claims pending before the Arbiter falling within its scope. Should counsel for any claimant or for the Government of the United States be of the opinion, and so certify in writing, that the peculiar facts of any case are such as to require a different application to that case of a principle, or a modification of a rule, here announced, such certificate with the argument and authorities in support thereof will be considered by the Arbiter, and should he determine that the certificate possesses merit he will set such case down for special argument.

Done at Washington October 31, 1928.

EDWIN B. PARKER,
Arbiter.

BOOK REVIEWS *

Recueil des Cours, 1926. Académie de Droit International. Paris: Librairie Hachette, 1927. 5 vols. Vol. I, pp. 554; Vol. II, pp. 598; Vol. III, pp. 608; Vol. IV, pp. 671; Vol. V, pp. 667. Indices.

These five volumes contain the lectures delivered at the Hague Academy of International Law at its session in 1926. They constitute the 11th, 12th, 13th, 14th and 15th volumes of the entire series, the earlier volumes of which have been reviewed in previous issues of the JOURNAL.[1]

Twenty-one professors altogether, representing eleven different countries, delivered lectures at the 1926 session of the Academy. Three of them (Salvioli, Grizzliotti and Ruffini) are Italian; two (Higgins and Hurst) are English; three (Jèze, Basdevant and Audinet) are French; two (Mandelstam and Taube) are Russian; two (Blociszowski and Cybichowsky) are Polish, and the others (Kelsen and Laun, A. Rolin, Krabbe, Ehrich, Lange, Heilborn and Simons, Pella and Milhaud) are Austrian, Belgian, Dutch, Finnish, Norwegian, German, Roumanian and Swiss respectively. The United States, Latin-America and the Orient were not represented; at least the volumes under review contain no lectures by professors from these continents.

About ten of the seventeen lectures relate strictly to matters of international law, two to international finance, three to the conflict of laws and one to political science. Only one lecturer dealt with the so-called laws of war, namely, Professor Higgins, who discussed the right of visit and capture in maritime war. This was the first instance, it may be remarked, since the establishment of the Academy in which the laws of war have been dealt with by any of the lecturers. In length, the lectures range from 58 printed pages, in the case of those by Professor Jèze, to 248 in the case of those of Professor Lange, and 344 in the case of those of Professor Mandelstam.

On the whole, the lectures come up to a very high standard of excellence and usefulness. Nearly every one is a substantial contribution to the literature of the subject discussed, the authors being in every case eminent authorities in the fields with which their lectures deal. It is not possible within the compass of a book review to analyze the lectures contained in these five volumes, to discuss the points of view of the authors or even to enumerate the subjects on which they discoursed. For the student of international law, the value or usefulness of the various lectures will necessarily vary.

* The JOURNAL assumes no responsibility for the views expressed in book reviews and notes.—ED.

[1] October, 1927 (Vol. 21), p. 816, and January, 1928 (Vol. 22), p. 195.

If we were to single out a few of those which in our judgment are likely to be most helpful, we might mention those of Professor Heilborn on the sources of international law, of Professor Higgins on the law of maritime war, of Sir Cecil Hurst on diplomatic privileges and immunities, of Professor Salvioli on the jurisprudence of the Permanant Court of International Justice, of Professor Jèze on international payments, of Professor Pella on the repression of piracy, of Professor Basdevant on the conclusion and redaction of treaties, and of Professor Kelsen on the relations between international and municipal law. The lectures of Professor Lange on the history of pacifism and the influence of the doctrines of the pacifists on the development of international law contain a comprehensive review in 248 pages of the development of the peace movement in modern times, and as such constitutes a supplement to his *History of Internationalism* before 1648 (published in 1919). Mention should also be made of Professor Mandelstam's lectures on international conciliation under the Covenant of the League of Nations and the jurisprudence of the Council of the League, a veritable treatise in 344 pages on the forms and progress of international conciliation prior to the establishment of the League, the procedure of conciliation as organized by the Covenant, and the progress achieved between the establishment of the League and the conclusion of the Locarno Pacts.

What was said by the reviewer in praise of the earlier volumes in this series may be said equally of the five volumes under review here. The fifteen volumes which have now appeared constitute altogether the most valuable contribution to the literature of international law that has been made during the last five years and in itself abundantly justifies the establishment of the Academy to which we owe this contribution.

J. W. GARNER.

Les Origines & les Phases de la Neutralité Belge. By M. Emile Banning. Published by M. Alfred de Ridder, Director General of the Archives of the Belgian Foreign Office. Brussels: Librairie Albert Dewit, 1927. pp. 276.

The ten years following the Armistice have witnessed the disclosure of numerous secret, or hitherto unpublished, documents bearing upon the events leading up to the World War. Of these it is safe to say that few have been read with greater interest or studied with closer attention than those relating to Belgian neutrality.

The work of Alfred de Ridder in assembling from the archives of the Belgian Foreign Office and publishing what were known as the *Secret Memoires of Banning* has thrown considerable light on certain phases of Belgian neutrality which cannot fail to interest every student of that subject as well as the general reader in international law. Emile Banning, for many years associated with the Belgian Foreign Office, found the elements for his work in the secret documents confided to his care. He finished the first portion

of his *memoires* in 1863 and continued them later up to 1877, treating among other notable events the conference called by Napoleon III to which Belgium was invited, the creation of a Belgian army corps for service in Mexico, the war of 1866, the question of Luxembourg and the problem of the Belgian railways.

Banning divides Belgian neutrality into two distinct phases: that before 1830 when neutrality was assumed from within, was accidental, voluntary and temporary; and after 1830, when permanent neutrality was imposed from without. The permanent neutrality of Belgium is now only a memory. Although probably the condition best suited to that country's international life and geographical situation, the neutralization of Belgium vanished during the World War in the unequal struggle to maintain it. Yet the various phases of Belgian neutrality, temporary and perpetual, are treated characteristically by the author and the whole work forms a background on which the reader may profitably sketch the events and discussions regarding Belgian inviolability that directed the course of nations at the outbreak of war in 1914.

CYRUS F. WICKER.

The League of Nations. By John Spencer Bassett. New York, London and Toronto: Longmans, Green & Co., 1928. pp. xii, 415. Index. $3.50.

This book is not an argument for or against the League of Nations; it is a history of the League during the first seven years of its existence, with some last touches as late as June, 1927, as the volume was going to press. The first chapter discusses the nature and structure of the League under a covenant, or charter, which was prepared under unusual and difficult circumstances and which in no stage of the proceedings had "the benefit of criticisms by a clear-headed opposition," but is, nevertheless, "a well considered, if somewhat theoretical, document."

The serious controversies that developed early within the League are set forth clearly, and so are the tactful and successful efforts of Balfour and Briand to bring about such adjustments between the Council and its critics in the Assembly as would not only save the League from collapse but also preserve its efficiency. There are chapters on the Aaland Islands controversy, the Polish-Lithuanian dispute, and on the gloom in the Third Assembly when it was feared that the general political situation in Europe would make void all that the League had done or hoped to do. There is a very frank discussion of the Corfu controversy, in which Mussolini defied the League of Nations and succeeded in having the case submitted to the Conference of Ambassadors. A separate chapter is given to the rejected Geneva Protocol which attempted what "was, in truth, a revision of the Covenant of the League of Nations," and another to the Locarno agreement, which "came as a glorious sunburst to a world hitherto overclouded." The story of Germany's entrance into the League is told, and this, together with

the gradual subsidence of war feelings which made it possible, marks a period during which the new agency in international politics was finding itself, developing its technique and learning how to do by actually doing.

Thirty pages are given to a discussion of the attitude of the United States toward the League, from the early "fearsome aloofness" to the later coöperation by means of unofficial observers and otherwise. In a final chapter the author reviews the situation at the end of seven years and points out some of the things that lie in the way the League is going—and must go. It will probably have to define the legal status of the mandates, and even now there is visible a tendency toward converting the mandates into permanent possessions. What new difficulties will this raise? Another frowning problem Professor Bassett finds in the question of reducing naval armaments, which he believes will furnish the supreme test of Great Britain's loyalty to the League.

Scholarship, understanding of grave difficulties which the League has faced and is facing, clear statement and enlightening interpretation of international problems characterize the book. It would be wholesome reading both for over-ardent advocates and bitter opponents of the League.

H. W. TEMPLE.

Olives of Endless Age. By Henry Noel Brailsford. New York: Harper & Bros., 1928. pp. vi, 431. $3.50.

This book tells of political and economic conditions that, unless our international organization is changed, will bring about another war; but through the author's proposals hope is offered for permanent peace. The world, which is represented to be in a state of anarchy, is becoming dangerously restless. It is dominated by capitalism, otherwise called economic nationalism or economic imperialism. The victors in the World War, Great Britain and France particularly, and Italy, to a certain extent, with over-powering armies and navies to support the commercial ambitions of their citizens for the control of raw materials and markets, have secured the upper hand in Europe, and through the Treaty of Versailles, the Treaty of Locarno, and the League of Nations continue to maintain their hold. They have humiliated and disarmed Germany. They have appropriated her colonies under the name of mandates and transferred to themselves land from other defeated countries for exploitation. Self-determination, a convenient slogan to help win the war, is too revolutionary for realization. Austria cannot unite with Germany; other nationalities that have been repressed or misfitted cannot come to their own. Plebiscites, on the whole, have failed to register the will of disaffected populations. The world has not been saved for democracy. Independence, sovereignty and equality are illusions, except for the great military Powers. This unhappy anarchy must give place to greater unity than is possible under the Treaty of Versailles and the system which it perpetuates. There must be a new form of

international government that can adapt itself to changing needs. What shall it be? Sovietism has made progress in Russia, but has been thwarted elsewhere in Europe, and also in Asia, by the intervention of the conservative nations whose interests are threatened by communism. Likewise a system of regional governments, Pan Europa and Pan America, is impracticable. A development of international capital, such as the iron and steel cartels, organized without regard to state lines, might become general and even supersede the great Powers. But a more likely solution is the transformation of the League of Nations into a world government, or great society, as the author calls it. This government could deal equitably with the affairs of the peoples by legislation, arbitration, or other pacific procedure. It could regulate commerce, transfer territory, direct migrations, and, in general, take over functions that now are jealously kept within the jurisdiction of sovereign states whose opposing interests result in war. It might, if necessary, coerce a rebellious state by international police or, better still, by boycott, as it could control the world's supplies.

The author is not an international lawyer, but a student of international relations. He has travelled widely and observed many things. He is a frank truth-teller, a critic with persuasive humor, and a master of the vocabulary of his subject. The reader, whether he agrees with the author or not, will be informed, challenged and stimulated by his essay.

JAMES L. TRYON.

Les traités de droit privé dans leur application aux nationaux des tiers états. By Maurice Capitant. Paris: Librairie Dalloz, 1928. pp. vi, 227. 30 fr.

Mr. Capitant's book is devoted to a study of the position of individuals whose juristic status is affected by treaties dealing with private international law. In the course of his investigation he analyzes: (1) treaties relative to the condition of foreigners; (2) treaties relative to the conflict of legislative competence or of jurisdictions; (3) treaties relative to protection of "duly acquired rights" (*droits régulièrement acquis*). The point which the author wishes to stress is that such treaties may affect not only nationals of the signatory states, but also nationals of states which are not parties to the treaty in question. He distinguishes, however, between treaties conferring rights (*traités de jouissance*), such as, for example, fishery treaties, treaties permitting nationals of the contracting parties to sue in each other's courts (*droit d'ester en justice*), or treaties relative to the liberty of commerce, and treaties relating to conflicts of legislative competence or of jurisdiction, *i.e.*, the Montevideo treaties of 1889, or the Hague conventions of 1902 and 1905.

Treaties conferring rights apply, as a rule, to nationals of the contracting parties only, because they are concluded in the interest of the individual. Even there, however, notable exceptions exist. Treaties relative to con-

flict of laws, on the other hand, affect usually the nationals of non-signatory states as well, because they have in view not so much the rights of individuals as the law which should be applied or the court which should have jurisdiction.

Treaties concluded for the international protection of "duly acquired rights," such as the treaties for the protection of industrial, literary and artistic property, are most liberal in this respect. These extend, as a rule, protection not only to nationals of the contracting states, but to everyone, regardless of nationality, who has acquired such rights in one of the signatory states.

The greater part of the book is devoted to the study of treaties relative to the conflicting jurisdiction of courts or of legislatures. These treaties, as the author shows, are concluded either by applying a method of unification of the private international law systems of the contracting states (*i.e.*, the Franco-Swiss treaty of 1869, the Franco-Belgian treaty of 1899, the Montevideo treaties of 1889), or by a method of coördination of the competence of private international law systems in question (*i.e.*, the Hague convention concerning marriage, or the draft-codes of M. Varela and of M. de Bustamente).

The method of unification is based on the principle of territorial competence; it consists in working out a conventional system which the contracting parties are bound to apply regardless of whether its application leads to the competence of the state's own laws and courts or to those of another state. The method of coördination is peculiar to treaties relative to conflict of laws and is fitted specially to bring about a solution in conflicts concerning personal status.

Mr. Capitant handles these intricate and controversial problems of private international law with skill and understanding as well as with clarity. Especially noteworthy is his suggestion for completing the method of coördination by treaties relative to conflict of laws with the doctrine of *renvoi* by which, he believes, the conflict between private international law systems based on the law of nationality and those based on the law of domicile would be eliminated. His criticism of the existing treaties, their application and interpretation will doubtless be found constructive and valuable for the drafting of such conventions in the future.

FRANCIS DEÁK.

Manuel de Droit Public Général du Monde Civilisé. By X. S. Combothecra. Paris: Librairie du Recueil Sirey. Geneva: Georg & Co., 1928. pp. 366. $4.00.

Dr. Combothecra has undertaken a very comprehensive task. He limits it somewhat by his definition of general public law, as that branch of the law which has to do with natural and rational public law general principles, secondarily only with the positive law in force in a particular country [p. 13].

It includes internal public law, constitutional and administrative law and international law [p. 13], which latter is that branch of law having to do with external social relations, *i.e.*, not national [p. 11]. The author believes that there is an abstract absolute justice in social relations, in "the law of nature" discovered by the observation of facts and rational law, which is the absolute justice discovered by reason. The positive law is the law in force which is supposed to be an expression of justice. An expression of a prevailing interest would seem to the reviewer's experience in legislation a more exact statement. The author has devoted the first part of his book to his conceptions of the principles of public law; in the second book, constitutional law; and in the third book, administrative law, he draws on public law as it exists in different countries.

American students of an interesting constitutional question having to do with personal habits, will be interested in the author's judgment that law must be an expression of public will, and cannot otherwise long continue in force [p. 33]. He also believes that the public authorities cannot continuously oppose the general will [p. 34]. The extent of the subject renders the author's treatment of important questions very succinct. For example, after saying that in the federal state only the federation is truly sovereign [p. 49], he remarks that the difference between state members of a federal state, the departments or provinces of a unitary state, is absolutely null from a juridical point of view [p. 50]. This thesis deserves development; it appears too sweeping to be very useful. Further, he says that the Permanent Court of International Justice is a judicial function, with a limited competence, of the League of Nations. This position is vigorously controverted, since the court is the creature of the Statute and not of the Covenant. His illustration of the powers and activities of states are taken principally from European experience and essentially from France and England. In describing a legislature, for example, he describes very briefly but well the British and French systems and omits entirely the very interesting legislative development of the United States. Furthermore, in describing the preparation of legislation, he omits the Parliamentary Counsel to the Treasury and the Legislative Counsel and legislative reference bureaus in the United States, all important organs. He criticises the American international system in that the Senate failed to ratify the Treaty of Versailles, but does not seem to remember that the French Parliament has not always sustained the executive, for example, in refusing to approve the Slave Trade Treaty in 1841, and in its present opposition to the Mellon-Berenger arrangement. The parliamentary system with the responsibility of the ministry behind the treaty presents a different picture than that of the presidential system, but it does not by any means always work smoothly, and it is the constitutional requirement that one-third of the Senate can hold up a treaty which makes the American system particularly unwieldy.

The book gives evidence of an enormous amount of research and is skillfully organized. It is a useful book of reference and stimulation to thought.

J. P. CHAMBERLAIN.

The Hungarian-Rumanian Land Dispute. By Francis Deák. Introduction by George W. Wickersham. New York: Columbia University Press, 1928. pp. xiv, 272. Index. $5.00.

The dispute which forms the subject-matter of Mr. Deák's carefully prepared monograph has proved one of the most baffling problems which the Council of the League of Nations has had to face since its organization. This *cause célèbre* arose some six years ago out of the seizure by the Rumanian Government, under the plea of agrarian reform, of real property of Hungarian optants in the territories ceded by Hungary to Rumania under the Treaty of Trianon. The questions primarily involved were whether the Rumanian law was in violation (a) of the provisions of the peace treaties designed to prevent the seizure of property of former enemy aliens in ceded territories, or (b) of the general principles of international law regarding the preservation of private property rights of aliens—both obviously justiciable questions. But the Rumanian Government has energetically fought every move to bring its national legislation before an international judicial forum, and the Hungarian Government has just as consistently refused to accept any compromise which would give it less than what it believes to be its clear legal rights in the premises.

Mr. Deák analyzes skillfully the issues raised in the course of the proceedings before the Council, and discusses in detail the interpretation of various provisions of the peace treaties and the Covenant of the League, the power of mixed arbitral tribunals to pass upon their own jurisdiction, the binding character of arbitral decisions, and the power of the Council to effect a settlement of justiciable issues by conciliation. The author is a Hungarian by birth and it is not surprising that his presentation of the case should have the flavor of a brief for the Hungarian contentions. But it is a temperate brief and brings out clearly all of the essential legal issues involved. It is to be hoped that the book will receive a wide reading, for the questions which it discusses have very important bearings upon the development of international arbitration.

FREDERICK SHERWOOD DUNN.

Les Principes Modernes du Droit Pénal International. By H. Donnedieu de Vabres. Paris: Recueil Sirey, 1928. pp. iv, 470. 40 fr.

This book is a continuation of the very excellent earlier work of the same scholar, whose *Introduction à l'Étude du Droit Pénal International*, appearing in 1922, was largely a historical study.[1] In his introduction, M. Donnedieu

[1] See this JOURNAL, Vol. XVI, No. 9 (July, 1922), p. 493.

de Vabres set forth his conception of this branch of the law, and in the present work, he repeats the definition of it as follows:

> International penal law is the science which determines the competence of the penal jurisdiction of the state toward foreign jurisdictions, the application of its criminal law, both substantive and procedural, in relation to the places and persons over which it has authority, and the validity of foreign repressive judgments upon its territory.

Those who are by inheritance and predilection so indoctrinated by the conception of exclusive territorial sovereignty, resulting in the proposition that it is essentially a matter for the individual state to handle crime, naturally accept without criticism the prevailing legal scheme, according to which one state is under no extra-conventional legal duty to extradite criminals. They will have some difficulty in accepting the premises of the modern Continental school of international penal law, just as they have had aversion to much of the Continental thought in private international law generally. Crime, however, and its effects, do not stop at the frontiers of a state. Like disease, it has become a matter of common international interest and concern. Whether one starts with the internationalism of Grotius or the *Rechtsgemeinschaft* of Savigny, the fact is that matters of such common international interest are becoming subject to legal regulation. International penal law fits into, and is not wholly separated from, international public law because municipal criminal law is public law.

International public law seeks to provide a body of principles by which conflicting claims to exercise jurisdiction asserted by states may be resolved. International penal law seeks to do the same thing. There have been and are conflicts of jurisdiction between the various forums, *delicti*, *domicilii*, *patriae* and *deprehensionis*. Jurists of the school of M. Donnedieu de Vabres consider that it is the function of international penal law to resolve these conflicts. If this be done there will be accomplished another stage in the building of a world legal order which does not involve a superstate. The author does not make excessive claims. He is not an extremist like M. Pella, whom he criticizes. The two opening chapters discuss territorial and personal jurisdiction. The doctrine of the solidarity of states is the most serious objection to the former, while the latter offers no complete assurance of the repression of crime. The author thereupon undertakes to set forth a realist doctrine and system based upon the universality of the right to punish. This would involve recognition in public law of the counsel of perfection, *aut punire aut dedere*, which obviously has not yet been made, though he cites a quotation from Travers made in support of the Turkish claim in the *Lotus* case. The implied recognition of the doctrine, at least in part, by municipal legislation is impressive. The author, however, bases the principles upon legal philosophy: the newer law of nature of Charmont, the *rechtliche Recht* of Stammler, or the irreducible law of nature of Gény.

J. S. REEVES.

Documents of Russian History, 1914–1917. By Frank Alfred Golder. Translated by Emanuel Aronsberg. (The Century Historical Series.) New York and London: Century Company, 1927. pp. xvi, 663. Index. $4.00.

To provide the basis for an objective examination of the Russian revolution and of the Bolshevik experiment, a series of studies has been projected of which the book here reviewed is the first fruit. This first volume contains a selection from the sources for the history of Russia from the beginning of the war in 1914 to the seizure of power by the Bolsheviks in November, 1917. It is an essential introduction to any study of Bolshevism to know the circumstances in which it appeared and the foundation on which it had to build. It is unreasonable to judge the failures and successes of the Bolsheviks only by comparison with conditions outside of Russia or even with those in Russia before the war. The documents selected by Professor Golder show from many points of view the decline and fall of the Russian Empire and the efforts to start the Russian Republic on its course. More than a third of the book deals with the "old régime," the situation in Russia before the revolution of March, 1917. The remainder follows the development of the revolution, the struggles of the various parties for the control of the state, and the final triumph of the Bolsheviks over their opponents. It is impossible, in a brief review, to give an adequate impression of the variety and richness of the sources presented and of the many problems illumined by them. The table of contents covers nearly eight pages. The materials have been taken from many sources, from the documentary publications of the Soviet Government, memoirs like those of Rodzianko, Lubomirski, and Shulgin, the correspondence of the Imperial family, diaries, and newspapers; most of which have never before been translated. The editor, Professor Golder, is one of our foremost students of Russian history and conditions. He has brought to his task the trained mind of a scholarly historian and the experience of a sympathetic and observant traveller in Russia. No one is better qualified to select and edit the documents on Russian history, and no one, in this country at least, has at his disposal a richer supply of sources than can be found in the Hoover War Library at Stanford University, where this book was prepared.

L. D. STEEFEL.

Handbuch des Völkerrechts. Band II, 1: Rolf Knubben, *Die Subjekte des Völkerrechts,* pp. xvi, 528, Mk. 30; *Band II, 3:* Josef L. Kunz, *Die Anerkennung der Staaten und Regierungen im Völkerrecht,* pp. vi, 218, Mk. 12. Stuttgart: W. Kohlhammer, 1928.

Students of international law will be glad to know that the *Handbuch* series, which was interrupted by the war, is again prosecuted with characteristic German vigor and, it is hoped, will soon be completed. The general

reader may be reminded that this series, of which ten volumes have now appeared, when complete will consist of twenty-one volumes arranged under six general heads, or *Bände*, and will cover the entire field of international law from its fundamental concepts and its history to its latest development and tendencies. But primarily the purpose of the series is to present a statement of international law as it is today in theory and practice. It is a monumental project, worthy of encouragement by all scholars, for the ten volumes that have thus far appeared are a distinct contribution not only to international law but to legal science in general.

The general scope of the work of Dr. Knubben, "The Subjects of International Law," can perhaps best be indicated by saying that it attempts to answer the question to what extent states only are parties in international law. This question was discussed at length at the seventh annual meeting of The German International Law Society, held at Wiesbaden in 1926. The resolutions then adopted form the motive rather than the basis or *Ausgangspunkt* of Dr. Knubben's study, for he begins with a general consideration of fundamental conceptions and principles; and, while the title might indicate a limited or restricted field, he covers the whole range of history, theory and practice, using the subject as a means to a new orientation. In the 528 closely printed pages he really covers the whole field of international law, objectively and subjectively. It is a work primarily for scholars, very thorough, theoretical and informing, but not always easy reading. This is not, however, due to a defect in treatment or arrangement of material, but rather because the subject itself does not admit of easy thinking.

The work of Dr. Kunz, "The Recognition of States and Governments in International Law," is interesting for several reasons. First of all, it is a clear, thorough and very readable study of the subject in hand, which he treats in five chapters under the general heads of theoretical principles, general survey of the theme, recognition of states, of governments, and of parties to war. The second point of interest is the viewpoint, which represents a reaction against the historical school of jurisprudence, begun by Kelsen and carried forward by Verdross and the author of the present work. "We have," he explains in his first chapter, "attempted to give a theoretical foundation of the science of international law which we call the 'Hypothesis of the primacy of international law.'" This is a theory "which teaches the legal supremacy of international law over all national law"; not constructed, however, with a view to determine *a priori* what the future international law should be, but what it actually is at present. A third point of interest in the present work is the tendency, observable in many recent German writers, to give international law a philosophical basis and to see in its study and development the greatest hope for world peace. Both volumes here reviewed are well documented from sources that take into account American as well as English and European writers.

KARL F. GEISER.

The Legal Effects of Recognition in International Law: As Interpreted by the Courts of the United States. By John G. Hervey. Philadelphia: University of Pennsylvania Press. London: Oxford University Press (Humphrey Milford), 1922. pp. xiv, 170. Index. $3.00.

The prolonged non-recognition of the Soviet Government by the United States has raised a number of legal problems which the courts, in recent years, have sought to solve, with varying degrees of success. Writers on international law have devoted considerable attention to the legal effects of recognition, and various aspects of the subject have been ably presented in legal periodicals by Professor Borchard, Professor Dickinson and others. Mr. Hervey, in his brief study, makes no analysis and offers no criticism of the opinions expressed by these writers. He does no more than summarize the leading cases, English and American, in which the effects of recognition have been examined, and to suggest the methods best adapted for the solution of such cases in the future. He deals, in turn, with the relation of the courts to the political department in matters of recognition; the retroactive effect of recognition; the capacity of the unrecognized government to sue in foreign courts; the immunity of such a government from suit; and the extent to which its acts will be applied by foreign courts. His conclusions, generally sound, are weakened by insufficient analysis of the cases discussed. He fails to distinguish clearly between admission of a government's existence *de facto* and recognition of a new government (so-called "recognition *de jure*"). He makes little of the opportunity to examine certain features of the Soviet Government which might exercise a profound influence on the decisions of the courts, such as its monopoly of foreign trade, its attitude towards private property, the class character of its legislation. Mr. Hervey favors, on the whole, a liberal interpretation of facts rather than strict adherence to the letter of the law; he agrees with Judge Cardozo that effect should be given in the United States to those acts of the Soviet Government upon which private rights and obligations depend, "provided that in so doing the courts neither encroach upon nor dictate a policy to the political departments of the government." This fairness of approach, combined with lucidity of style, should make Mr. Hervey's study of value as a textbook.

VERA A. MICHELES.

Problems of the Pacific. J. B. Condliffe, Editor. Proceedings of the Second Conference of the Institute of Pacific Relations, Honolulu, 1927. Chicago: Chicago University Press, 1928. pp. xiv, 630. Index. $3.00.

Under the auspices of the Institute of Pacific Relations in the summer of 1927, some 135 delegates, representing ten nations facing the Pacific, met in conference in Honolulu, and the present volume, the second of the series, is the proceedings of this conference. Edited with painstaking care by Professor J. B. Condliffe, of New Zealand, this volume is an invaluable

storehouse of information on the various social, economic and political problems of the Pacific basin.

The volume is divided into three parts, the first and shortest being devoted to a series of brief papers indicating the outlook of each of the national groups on Pacific Affairs. Instead of being merely formal addresses devoted to polite expressions of good will, these statements are frank, even blunt summaries of the problems which each group sees confronting its nation in relation to its Pacific neighbors. For instance, the Chinese statement made no effort to gloss over the hostility of the Chinese people to the unequal treaties and their intention to be rid of them. The British representative confessed frankly that the Four-Power-Pact was better than the Anglo-Japanese Alliance.

The second section presents in summarized form the round table discussions. The topics covered include: Tariff Autonomy in China; Extraterritoriality in China; Foreign Concessions and Settlements in China; Population and Food Supply; Immigration and Emigration in the Pacific; The Pacific Mandates, and other kindred topics. These summaries give in brief compass an excellent survey of the background and present situation of each of the problems discussed, with full references to documentary and secondary sources whence fuller information may be obtained.

The third and longest section of the book is perhaps the most valuable for reference purposes. It consists of some 400 pages of monographic material prepared specifically for the conference in the various subjects discussed in the round tables. These studies cover a wide range of subjects and the material is organized in scholarly fashion. To the student of international law, the sections prepared by Ming Chien Joshua Bau on Tariff Autonomy, Exterritoriality, Concessions and Settlements, and Documents Relating to the Chinese Question are particularly useful. Equally valuable are the rather lengthy studies on the Legislative Aspects of Asiatic Migration, prepared by the International Labour Office, and Notes on Certain Aspects of the Work of the League of Nations of Interest to the Pacific Countries, prepared by members of the League of Nations Secretariat. The mandate section of the latter study is a very useful survey of the work done in the Pacific mandate area.

The book, contrary to most of its type, is published in an attractive form and with an adequate index. No student interested in the questions of the Far East can afford to overlook this volume.

GRAHAM H. STUART.

Probleme und Entscheidungen der Deutsch-Amerikanischen Schadens-Commission. By Wilhelm Kiesselbach. Mannheim, Berlin, Leipzig: J. Bensheimer, 1927. pp. xv, 473.

The author of this work served as German Commissioner in the German-American Mixed Claims Commission which was established pursuant to

the agreement of August 10, 1922, between the United States and Germany. In his book, which deals with the problems and decisions of the Commission, Dr. Kiesselbach gives a clear summary, from the German point of view, of the questions involved and, in the second part, of the opinions and decisions rendered. For the German reader the author's account is extremely valuable in offering an authentic and generally comprehensible survey of the workings and achievements of the Commission; for the American reader the book is of great interest in presenting the carefully reasoned German estimate of the Commission's labors and of the American point of view. This estimate, frank, yet moderate and fair, is well characterized by the following words (p. x):

> Serious disappointments could not be spared the German side, whose representatives were called upon to defend the rights of a vanquished people in a foreign atmosphere and against foreign conceptions of law. But never could these disappointments shake our faith in the upright spirit of the Umpire, Judge Edwin B. Parker, who was constantly animated by a meticulously honest striving for impartiality.

The first part of the work, dealing with the problems, is divided into the following sections: (1) History and problems of the Commission, (2) Legal nature of the claims, (3) Neutrality claims, (4) Nationality of the claimants, (5) Extent of the obligation to render compensation in cases of death or injury (Lusitania cases); (6) Claims of life insurance companies, (7) Claims of marine underwriters (subrogation), (8) Extent of Germany's obligation to render compensation in cases of loss, damage or injury to property—"loss"—and causal relation, (9) Naval and military works or materials, and (10) Claims of corporations. Each of these questions is instructively discussed at length, and, though revealing an attitude which at times is at variance with American practice and tradition, the discussion breathes the same spirit of fairness and deference to the opinions of others which animates the sentences quoted above. The rest of the volume gives the German text of the Treaty of Berlin of August 25, 1921, and of the agreement of August 10, 1922; also a list of the German memoranda and the German translations of the decisions and opinions.

EDWIN H. ZEYDEL.

The Protection of Minorities. By L. P. Mair. London: Cristophers, 1928. pp. xvi, 244. Index.

One of the chief causes of the unrest existing in Europe at present is the unhappy situation of the minorities created by the peace settlements after the World War. For the protection of these minorities, and simultaneously with the peace treaties, the principal Allied and Associated Powers concluded separate treaties with those states to which minority groups were allotted. The provisions of these so-called minorities treaties were also inserted in the peace treaties. In her book, Miss Mair undertakes the praise-

worthy task of surveying how the League's Council, under whose guarantee the minority treaties were placed, has executed its duty of protecting the minorities.

A short introduction acquaints the reader with the essence of the minority problem, the difficulties of achieving intended protection due to the extreme conceptions of sovereignty advanced by the various states, and the efforts made towards such protection prior to 1918. After summarizing the provisions of the minorities treaties and the procedure relative to claims arising under them agreed upon from time to time by the Council, the author numerates the claims brought before the League concerning minority grievances in Poland, the Baltic States, Czechoslovakia, Austria, Hungary, Rumania and the Balkans, Italy and Armenia, indicating at the same time the mode of redress, if any, adopted in these cases. A brief consideration of the question of doubtful nationality and an abstract of the deliberations of the Congress of National Minorities concludes this interesting study.

Miss Mair's aim is to present "simply a summary of the cases that have come before the League of Nations and the action taken on them." In this she succeeds remarkably well, presenting the cases concisely, although in some instances facts essential to the understanding of the issue are omitted. No mention is made, for instance, of Sir Austen Chamberlain's famous report of September 17, 1927, in the case of the Hungarian optants which is generally considered as one of the turning-points in this controversy. As source material the author has used official documents almost exclusively, and she certainly cannot be accused of bias or prejudice. The best evidence of the value of her work is that, without pronouncing any opinion, she succeeds in impressing the reader with the extreme importance of this problem, the hardships inflicted on people belonging to minorities (her simple presentation of facts concerning the German minorities in Italy is truly appalling), the arbitrary interpretation given to the minorities treaties by the states which assumed obligations under them, and the League's seemingly inefficient handling of their enforcement. Miss Mair apparently attributes the League's seeming inefficiency to the regrettable fact that since 1925 many of the documents relating to minority problems have been withheld from publication. Her book is worthy of serious consideration and will doubtless be greatly appreciated by students of international affairs.

FRANCIS DEÁK.

The Drafting of the Covenant. By David Hunter Miller. New York and London: G. P. Putnam's Sons, 1928. 2 vols. $15. Vol. I: A personal account of the genesis and drafting of the Covenant of the League of Nations, with introduction by Nicholas Murray Butler. pp. viii, 555. Vol. II: Texts of the documents cited by the author. pp. iv, 857. Index.

Nothing has yet appeared of equal value to these two volumes concerning the origin and evolution of the Covenant of the League of Nations. Mr.

Miller was the James Madison of the commission which drafted this immortal document. His interest, energy, and painstaking industry entitle him to the highest praise. I must confess to a sentiment of amazed admiration for the manner in which he gathered and preserved official and fugitive data of the utmost significance for the proper understanding of the intent of the framers of the Covenant. Dr. Butler has well said in his introduction:

> As a source book for the historian, the public lawyer and the statesman, this record is well nigh invaluable. It speaks for itself and is commended to the judgment and careful study of those in every land who are solicitous to follow this notable undertaking in its genesis and early history and who wish by all possible means to strengthen its hand in the development of international law, in the suppression of aggressive war and in those policies of international coöperation to protect and promote the health, the good order and the satisfactions of nations, great and small, throughout the world, which have already accomplished so much.

I find it impossible to carry out an intention to analyze these two volumes. It would require a good deal more than a book review. Even if one singled out some special topic, such as, for example, the author's presentation of the very interesting question concerning the legal implications of the "preliminary" convention contemplated at one time by the Allied and Associated Powers in order to ease the military situation with Germany, it would lead to a discussion of too great a length. It is of interest, however, to note in this connection that Mr. Miller takes strong exception to the point of view held by Mr. Ray Stannard Baker, in his book *Woodrow Wilson and World Settlement*, that there was a plot on foot to sidetrack the Covenant by means of preliminary terms of peace.

There is much material in these volumes which would have interested immensely the opponents of the League during the debate on the Treaty of Versailles by the United States Senate. They would have been particularly interested in the observations made by President Wilson in the course of the discussions of the Commission on the League of Nations concerning such subjects as future responsibilities of the United States towards Europe and the interpretation of the Monroe Doctrine. Mr. Miller, in the final chapter of Volume I entitled "Looking Backward" permits himself definite prophecies, as well as comments, on the attitude of the United States towards the League which reveal his ardent though partisan devotion to the League. No one has a greater reason than himself for loyalty to a cause in which he played so important a rôle. He has earned a great debt of gratitude from all who will have the privilege of profiting from his splendid contribution to the literature on this most important subject.

PHILIP MARSHALL BROWN.

The Restless Pacific. By Nicholas Roosevelt. New York: Charles Scribner's Sons, 1928. pp. xii, 291. Index. $3.00.

This volume presents a survey of the countries of the Pacific which is both interesting and instructive for the general reader. It stresses the geographic and economic factors, and the clashes in international policies of the Pacific Powers. It is well written, and contains many helpful charts and graphs. The author aims to show the increasing importance of the Pacific region in world affairs, the close interrelationship between the politics of Europe and Eastern Asia, and the effect of this relationship on American interests.

In the chapters devoted to international relations, Japan and Russia are viewed as the states which may disturb the *status quo*, while the British Empire, the United States, and Holland wish to maintain it. For Japan's achievements there is genuine admiration: "Japan's transformation from a feudal into an industrial state within a half century has been one of the political wonders of the world." But the country is handicapped by a deficiency of mineral resources and by the necessity of constantly developing its industries to keep pace with the rapid increase in its population. Intensely nationalistic, Japan aims at the domination of the Pacific and Eastern Asia, but has been uncertain as to the policy best adapted for this purpose: military or naval means, or the cultivation of close friendship with China. The United States appears "to Japan—or at least to her jingoes and to the mass of the people . . . as a selfish meddler interfering unreasonably with Japan's natural aspirations"; yet the danger of war between the two countries "seems almost negligible." As for Russia, Soviet imperialism differs from the Czarist only in method, "both being in aim aggressive, designing, unscrupulous." The rivalry between Russia and Japan over Manchuria makes that region "one of the danger spots of the world"; "strategically it is destined to be a battlefield again as it was in 1894 and 1905." "America is today an Asiatic power," standing for the Open Door, sympathetic with China, with a steadily growing Pacific trade, but suffering slightly from "an overdose of idealism," and in some danger from its "sentimentalists and pacifists" who urge the independence of the Philippines, a step which would not only severely injure American influence in the Pacific, but would also "upset the political equilibrium in the Far East." China, "the great enigma," is attempting to modify its whole civilization to meet the demands of a modern age, but has no unity, is dominated by war lords, and faces the probability "that the present political chaos is likely to continue for a period of from twenty-five to seventy-five years."

The point of view of the author, particularly important in a work in this field, is shown by his dedication of the volume to the memory of Admiral Mahan, "realist." It is natural, therefore, that the naval and strategic factors in the Pacific should be stressed, and that frequent pleas should be made for a strong American navy, a large merchant marine, and for the

retention of the Philippines. It may be the same viewpoint which attributes to the Japanese as a whole the ambition of its jingoes: "Japan aims to be tomorrow—lord of the isles of the Pacific, master of China, sovereign of Asia." It may, too, account for the lack of a sympathetic appreciation of the better elements in the Nationalist movement in China.

GEORGE H. BLAKESLEE.

Aërial Bombardment and the International Regulation of Warfare. By M. W. Royse. New York: Harold Vinal, Ltd., 1928. pp. xvi, 256. Index. $4.00.

After a brief discussion of the general regulations of military interests, Dr. Royse gives detailed statements in regard to the prohibition of aërial bombardment as this question was discussed at the First and the Second Hague Peace Conferences. A further brief chapter on international regulation of warfare is followed by a study of the rules of bombardment. The present status of aërial bombardment as set forth by Dr. Royse shows that there is much to be desired in the way of regulation, even if the rules of the Commission of Jurists, as embodied in their report of February 19, 1923, are adopted. The conclusions of Dr. Royse, briefly set forth in five pages, maintain that as yet there is no effective sanction for the prohibition of aërial bombardment and he affirms:

> Military objectives are likely to be hunted down and attacked, and the fact that incidental harm may fall upon non-combatants and that the incidental destruction of property may at times approximate devastation probably will be accepted, as heretofore, as an unavoidable incident of warfare.

As one reads this book, he feels inclined to suggest as a sub-title "The Development of Aërial Navigation as influencing Conventional Agreements, particularly relating to Aërial Bombardment." The book is the fullest statement that has appeared upon this subject, is exceedingly well documented, with a good bibliography and index.

GEORGE G. WILSON.

The History of European Liberalism. By Guido de Ruggiero. Translated by R. G. Collingwood. New York and London: Oxford University Press, 1927. pp. xii, 476. Index. $5.50.

Professor Ruggiero's notable book, made available in this excellent translation, contains some matter of immediate interest to students of international law and politics, as, for example, its discussions of nationalism (pp. 407–416), of eighteenth century *jus naturale* (pp. 23–32), and of the juridical conception of the state in nineteenth century German thought (pp. 251–265). The great value of the book lies in the masterly sweep and depth of its in-

terpretations of the forces which have moulded modern politics. The author weaves a brilliant picture of the interaction between social forces, on the one hand, and political and legal speculation on the other, resulting in the creation of the dominant jural conceptions and motivating political ideals of the nineteenth century. The importance of this story for the student of international affairs is obvious, since the doctrines of nationalism and non-intervention which were the special contributions of nineteenth century liberalism to international politics were organically related to trends of fact and thought which in the internal economy of states created democracy and *laissez-faire*.

Professor Ruggiero finds the roots of modern liberalism in the spiritual independence of the individual emphasized by the Protestant reformation. This individualism fostered the conception of the state as a society based on the coöperation of free autonomous citizens, a conception which became ultimately explicit in Rousseau's theory of the state as embodying the general will of its members. Such a conception dissolves in democratic absolutism the barriers with which earlier liberalism had sought to protect the individual against the state when the state had still seemed something other than the individual magnified.

Nationalism is represented as, on the one hand, the doctrine of Rousseau applied to international politics—"the liberal idea of the state as the self-government of the people is realized in the national state." On the other hand, "the principles originally formulated with reference to individuals were applied by analogy to nations. No nation had the right to invade the sphere of another; a nation's aspirations towards independence were worthy of encouragement by other nations as the acts of a nascent personality" (pp. 410–411). Professor Ruggiero, while recognizing that national unity must issue from an organic tradition, recognizes also that, because of economic and political necessities, no racial group can live wholly alone. The first consideration leads him to point out "the error in what are known as plebiscites, which are nothing but a reminiscence of the old social contract" (p. 409), with its too great emphasis on a momentary act of will; the second undermines the theory of ethnographic boundaries. "Even where it is possible," asks Professor Ruggiero, "must it be asserted as an axiomatic principle that the destinies of a great nation must be at the mercy of trivial and national vanities bent on dividing it?" (p. 414).

JOHN DICKINSON.

Démilitarisation et Neutralisation des Iles d'Aland en 1856 et 1921. By J. O. Söderhjelm. Helsingfors: Söderstrom & Co., 1928. pp. xvii, 380. Appendices.

A fair appraisal of the above-named work will take into consideration a great deal of valuable effort and accomplishment, together with some outstanding weaknesses. In the first place, the title might very well have

added the words, "historically and topically treated without consistency in either." Over one-third of the book is devoted to a discussion of the convention of October 20, 1921, in which the signatory Powers provided for the démilitarization and neutralization of the Aaland Islands. Here a very suggestive and illuminating analysis of the rights and obligations to which Finland succeeded in connection with the islands upon her obtaining of independence is to be found. It is the most exhaustive treatment on this phase that can be obtained. Secondly, the bibliography is not as scholarly presented as it might be. A score or more of books, such as Moore's *Digest*, are generally cited without any reference to volume, chapter, page, or section. Very few of the original sources are mentioned, while a wealth of secondary material fills pages. Thirdly, the author unconsciously finds himself in an interesting dilemma. In Chapter II he goes to considerable pains to prove that there is no such thing as an international servitude. He states that the term is derived from Roman law and has a bearing only on private affairs. It has been incorrectly lifted from the latter and therefore is erroneously used in the international affairs. Nevertheless, Söderhjelm finds it impossible to continue his discussion without employing the very word servitude (pp. 120 *ff.*), although he does attempt to alleviate the effect by the use of quotation marks. Fourthly, there may be some question as to whether all authorities would agree that Czechoslovakia by being the only non-signatory Power to recognize the convention of October 20, 1921, incurred any particular liability thereby, although the author seems to be convinced that she did. Finally, probably the most valuable part of the work is to be found in the appendices listed as *Pièces Justificatives*. Here several important documents and treaty provisions are printed. Most of them have been available in scattered sources; but this, to the best knowledge of the reviewer, is the first time that they have all been collected under one cover. Lest the above should give an erroneous impression, it must be stated that the book seems thoroughly reliable, readable, and remarkably free from that bias which so often creeps into discussions of present and proximate political problems. Any improvement will not come in the subject matter and authority, but in refinement and organization.

THORSTEN KALIJARVI.

Survey of International Affairs, 1925. Published in three volumes by the Oxford University Press, American Branch, New York. Volume I, pp. xvi, 611, $8.50; Volume II, pp. xii, 486, $8.50; Volume III, or Supplement, pp. vi, 235, $4.25.

This work, issued under the auspices of the Royal Institute of International Affairs, London, is for the specialist in political science or for the person who wishes to be well informed in world events an encyclopedic work of first importance. It is so thoroughgoing in its treatment that it appeals to the scholar, but is so free from a technical vocabulary and so readable in

style that it does not deter the average reader from acquaintance with its valuable contents. Volumes II and III are recently off the press. In Volume III there is a splendid piece of work incorporating the chronology of International Events and Treaties from January 1, 1920, to December 31, 1925, compiled by V. M. Boulter. Government departments, foreign embassies and legations assisted in the verification of dates. In the Chronology, countries are arranged in alphabetical order and, if, for example, one wishes to find the date of important events in Turkey during the period, one may turn at once to these and find in a space of five pages a résumé of Turkish history during this dynamic period.

Volume II is divided into four parts. Mr. C. A. Macartney, the author of *The Social Revolution in Austria*, is responsible for the preparation of the sections dealing with the events during 1925 in Europe (Parts I A, II A–D) and during the period 1919–1925 in the American Continent (Part IV), while Miss V. M. Boulter, who is Professor Toynbee's able assistant at the Institute, writes the section on Southeastern Europe (Part II E). Professor Toynbee contributed certain sections. In his introduction, G. M. Gathorne-Hardy, Honorary Secretary of the Royal Institute of International Affairs, points out: "The Council are also indebted to well-informed contributors, who prefer to remain anonymous, for the section on opium (Part I B, VI) and for the chapter on the Far East (Part III)." Whoever these anonymous writers are, they impress the reader as keen students of a situation which seems a tangled one to many of us in America. Of particular significance in Volume II for American readers interested in world peace are sections devoted to the negotiations leading up to the Treaty of Locarno, the Locarno conference with the resulting treaties, and the question of disarmament. Social reformers will find illuminating material on the traffic in opium and other dangerous drugs, the health organization of the League of Nations, the efforts to protect women and children, and other humanitarian activities of the League. The part of the Survey devoted to the American Continent (Part IV), in Volume II, deals with the relations between the United States of America, the Latin-American Republics and the League of Nations. This treats various boundary disputes and settlements between Latin-American Republics. The ratification of the treaty concerning the Isle of Pines between the United States and Cuba and the liquor conventions between the United States and Great Britain and other countries are also included.

The Islamic World since the Peace Settlement, comprising Volume I, is the subject of a masterly treatment by Arnold J. Toynbee, Director of Studies in the Royal Institute of International Affairs and Professor of International History in the University of London. Some years ago Professor Toynbee showed a marked understanding of Near Eastern affairs in his book *The Western Question in Greece and Turkey*, and the additional years have given him a maturity and a knowledge of the situation which

make him a leading authority on the subject under consideration. International events in Northwest Africa and the Middle East from 1920–1926 are here presented with care. Part II of this first volume deals with the abolition of the Ottoman Caliphate and the various events leading up to this decisive action by the Turkish Great National Assembly. Persons interested in the Near East will welcome Professor Toynbee's excellent exposition. This volume is replete with interesting footnotes giving facts with which most of us are unfamiliar.

There are valuable appendices and maps. In Volume II is given the Locarno Pact, and a portion of the Mexican Constitution of 1917. In Volume III are the three Turkish Laws of the 3rd of March 1340 (1924), the memorandum submitted by the Third Committee of the Caliphate Congress held at Cairo on the 13th–19th May, 1926. Among the maps are those of China and the Manchurian Railways, Northern Morocco, North and Central Arabia, the Vilayet of Mosul and the Islamic World (31st December, 1925).

The Royal Institute of International Affairs in giving these three highly significant volumes to the public have put us all under a lasting obligation. They will prove an important addition to any library.

CLARENCE RICHARD JOHNSON.

The Mind and Face of Bolshevism, An Examination of Cultural Life in Soviet Russia. By René Fülöp-Miller. Translated from the German by F. S. Flint and D. F. Tait. New York: Alfred A. Knopf, 1928. pp. xv, 433. Index. $6.00.

The Real Situation in Russia. By Leon Trotsky. Translated by Max Eastman. New York: Harcourt, Brace & Co., 1928. pp. xxvi, 364. Index. $2.50.

Present-Day Russia. By Ivy Lee. New York: The Macmillan Co., 1928. pp. xii, 206. $2.50.

Soviet Russia in the Second Decade: A Joint Survey by the Technical Staff of the First American Trade Union Delegation. Edited by Stuart Chase, Robert Dunn, and Rexford Guy Tugwell. New York: The John Day Co., 1928. pp. xvi, 374. Index. $4.00.

Fundamentally, Mr. Fülöp-Miller is right in treating Bolshevism as a modern religion offering a new salvation, to which all other beliefs and practices are heresy; yet he hardly succeeds in writing with poise and freedom from partisanship and personal prepossessions. His intensely interesting account of Bolshevik art, poetry, education, music, and philosophy has for its central theme the education of the collective man and the subordination of the individual personality to the economic mechanism of communist organization. But if Bolshevism is a modern religion gone wrong, the author is of little help to the outsider in treating the Russian phenomenon

with humorless unrestraint and personal enmity, a process ending in many inconsistencies. If Bolshevism is the antithesis of personality, how may one explain the worship of Lenin and the rule of dominant leaders by the power of their personality? If Bolshevism scoffs at the inner life, how reconcile its devotion to art, the preservation of historic monuments, and the assiduous cultivation of poetry, art, music, and dramatics without waiting for the technological processes to determine their forms? It is an error to insist that the mind and face of Bolshevism, as respect of machinery and technological efficiency, are different from the mind of Europe or America; unless it is pointed out that our advanced thought has discerned that the conclusions of the mechanical bias are insufficient from the standpoint of society in general, while that the Bolshevik is continuing in his worship of mechanism as an abstract entity. At the same time, the author overlooks what is most important and interesting to the world in the Bolshevik experiment, a factor so inconsistent with communist professions regarding the collective man, namely, the recognition of racial minorities within the Empire and the encouragement given to cultural individuation in local customs and languages. This is an important side of the mind of Bolshevism, important to the cause of international peace, which flies in the face of the collectivist abstraction depicted by the author.

The book by Trotsky on *The Real Situation in Russia*, concerning the schism between himself as leader of the Opposition and Mr. Stalin, shows that contemporary political Russia is torn by the twofold development of capitalism and socialism. Nearly four decades ago, in 1889, the founder and leader of political socialism, G. V. Plekhanov, predicted that a revolution in Russia will succeed as a working-class revolution only. Events since 1917 have fully justified his prophecy. The Russian proletariat has made the revolution, but the peasants have directed it into individualist channels, while a new *bourgeoisie* and officialdom are gaining in power. It is not to be wondered at if the revolutionary zealots are crying out that the status of the working class is the touchstone of the success or failure of the revolution. The controversy between the forces of Trotsky and Stalin reflect the struggle of social forces within the revolutionary state, between a real workers' government and a permanent dictatorship by and for an ever-compromising group. In part, Trotsky's grievance is personal, against the men in power who are minimizing his loyalty to Lenin and the revolution itself; but in the main, his fire is directed against the opportunists as the allies of antiproletarian elements—the new capitalists, the rich peasants, and the new class of reactionary proletarian politicians or the professional careerists distinguished by their obedience only. He cites low wages, unemployment, low demand for industrial goods, bad housing, in proof of the failure of the working classes to profit by the revolution. The new bureaucratic state, Trotsky declares, devours a considerable part of the national surplus value created by labor, leaving labor with a smaller portion of the national income and with

less protection against social injustice. And he further charges that the situation will not improve so long as the present Soviets are divorced from the masses. He regards the proletarian politicians under the Stalin leadership as men who are disloyal to the fundamental doctrine of international revolution and who by their policies are leaving Russia undefended against the approaching imperialist attack from the West. To Trotsky the Soviet State has intrinsic value only as the means of international class conflict and socialism, and he believes that the Communist Party should preserve its original revolutionary purity and zeal, and not compromise itself by alliances and contacts with Western capitalism. On the other hand, the forces gathered about Stalin seek to preserve the gains of the revolution for Russia only, and to subordinate revolutionary theory and zeal to international political exigencies of the Soviet State.

The book by Mr. Ivy Lee is simple and unpretentious, perhaps the first popular book on Russia written without a preconception. Facts are set down honestly and faithfully, without any particularist politics or philosophy. Mr. Lee had sensed that Russian life is greater than the phrases and the stated purposes employed to define it, and because of that he does not find in the Revolution every mark of unexampled dissolution; on the contrary, he reports that the universal affections of the human heart—the enjoyments of family and property—are more powerful than communist propaganda. He sees problems in Russia, not propositions, and has the boldness to declare that the supreme challenge of modern Russia is not to domestic institutions but to the practical business statesmanship of the world, to the West and its faith in daily economic life as it exists.

The report of the thirteen specialists of the First American Trade Union Delegation is undoubtedly the best of its kind on modern Russia. It is not a unified work, but every topic by every specialist is covered with care and impartiality and scientific detachment, and because the individual writers are conscious of the living body that is Russia, the final impression is one of order and unity. The authors concur that since the period of Russian reconstruction which set in in 1922, the country is progressing towards definite goals, the chief aim being that of bringing about an integration of the economic activities of millions of people on a national scale. Such a task is admittedly without precedent in administrative annals, and therefore of immense value to the waiting world. The guiding integrating organization is the State Planning Committee, or the *Gosplan*, to which all other organizations submit their reports and schedules of industrial production for examination and approval, with the result that every trust or syndicate, and every unit within it, knows what its function in the general scheme of national economy is and what is expected of it. The separate chapters on political organization, education, concessions, etc., should be of interest to various readers. The dominant position of the peasant as "the ultimate dictator" of Russia is described with precision and firm grasp of his cultural differences.

Though an individualist as a farmer, the Russian peasant is accustomed to communal work and voluntary coöperative activities, and it is into this primary cultural form that the Soviet State is seeking to infuse a self-conscious form of communism. Separately or as a whole, this collection of articles is invaluable to the student of Russian affairs. The American experts did not play the prosecutor or the judge; they were not contemptuous, and hence, unafraid of the facts.

EUGENE M. KAYDEN.

BOOK NOTES

Principles of the Constitutional Jurisprudence of the German National Republic. By Johannes Mattern. Baltimore: The Johns Hopkins Press, 1928. pp. xvi, 682. Index. $5.

The content, nature and value of this work can perhaps best be indicated by saying that, from the point of view of information, it bears the same relation to the German Constitution that Madison's *Journal* and the *Federalist* would bear to the American if those two works were synthesized in a single volume. Among other things, it is an account of how the German Constitution came to be what it is, but told with a view to setting forth the principles upon which it rests. Like Madison's *Journal* it is an account, though not in the form of daily occurrences, of the struggles in the Weimar Assembly with the resulting conclusions; and, like the *Federalist*, it is an exposition of theory. The book is an outgrowth of a course of lectures delivered at Johns Hopkins University in 1924–25 and is, in a sense, a supplement to another earlier work by the same author entitled *Concepts of State, Sovereignty, and International Law.*

The material in this volume is well organized and is treated under three general heads. Part I is historical and theoretical, and includes an account of the transition from monarchy to republic, a discussion of the conception of state and sovereignty in German constitutional jurisprudence, and a summary of opinions on the legal continuity of Empire and Republic. The contents of Part II is fairly indicated by its title, "Relations of Reich and Länder" (States), while Part III, on "The National Government," in addition to a description of its structure, functions and powers, includes a discussion of such topics as "Different types of popular government," "Direct government by popular election," and "International and constitutional law." The strong emphasis upon theory throughout the work is one of its main features and is entirely in keeping with the author's purpose "to present to the student the general principles upon which the framers of the Constitution have avowedly constructed the new fundamental law of the National Republic."

KARL F. GEISER.

Précis élémentaire de Droit International Privé. By J. P. Niboyet. Paris. Recueil Sirey, 1928. pp. vi, 361. 18 fr.

This book, written in the interest of French law students, is an abridgment of Pillet and Niboyet's *Manuel de Droit International Privé*, which appeared in 1924. It follows the larger work in every respect, in both content and outline, except that it incorporates on the subject of Nationality the provisions of the French law of August 10, 1927. By a suppression of all notes and the elimination of all amplifications, the amount of reading matter in the *Précis* is reduced to about one-third of that of the *Manuel*. To those looking for first aid in their study of the French conflict of laws, this little volume may be warmly recommended.

ERNEST G. LORENZEN.

Napoleon III and the Rhine. By Hermann Oncken. Translated from the German by Edwin H. Zeydel; with a foreword by Ferdinand Schevill. New York: Alfred A. Knopf, 1928. pp. xxiii, 210.

"A translation of Volume I, pages 1–120, of *Die Rheinpolitik Kaiser Napoleons III von 1862 bis 1870 und der Ursprung des Krieges von 1870–71* (Stuttgart, Berlin, and Leipzig, 1926) by Hermann Oncken, professor of history in the University of Berlin, . . . this material serves in the original as the author's commentary upon the official documents which comprise the rest of three volumes" . . . and "throws more light upon the policies of Napoleon III in their relation to the genesis of the War of 1870–1871 than all hitherto published sources and discussions combined."[1] Throughout there is this note of assertion rather than of strictly calm interpretation. The foreword by Professor Schevill does not make extravagant claims and admits that Professor Oncken can be called partisan. But would Bismarck regard the statement concerning the Ems telegram as adequate? (p. xvii). Oncken pays little attention to German (or Prussian) attempts to crush France; regards with pre-war political philosophy French interest in the Poles as reprehensible, criticizes French demands for security and does not always admit that France might have been frequently content with buffer states instead of annexations. He relies very much upon the Austrian Ambassador to Napoleon III, Prince Metternich, for the innermost thoughts of the French Emperor. Napoleon III is compared, to his disadvantage, with Bismarck. Readers might well peruse simultaneously *The Origins of the War of 1870*, by R. H. Lord. Both maps and index are omitted, but there are important notes on the documents cited.

ARTHUR I. ANDREWS.

[1] Translator's note.

International Law as a Substitute for Diplomacy. By Marcellus Donald Redlich. Chicago: Independent Publishing Co., 1928. pp. xii, 208.

The author of this book considers the solution of the problem of international peace from the standpoint of "the new, and as yet little discussed or understood, rivalry between the diplomat and the international lawyer." The exact nature of this "rivalry" is not made very clear, as the author proceeds with a selected "series of scenes from diplomatic history." It is explained in the preface that these scenes are "borrowed . . . from the pages of leading historians." In the course of the work attention is directed to a variety of topics, such as the classification of diplomatic agents, their privileges and immunities, diplomatic representatives to quasi-sovereign states, diplomatic ceremonial, the powers and duties of consuls, consular privileges and immunities, extraterritorial rights, and international courts of justice. None of these could be expected to receive very adequate treatment in a work of this scope. Any plea for the gradual substitution of a reign of law for the inadequate type of diplomacy described perhaps merits consideration. But in the case of the present work, while some of the material taken from the history of diplomacy is colorful, the organization and method employed do not seem to the reviewer to be the most effective.

ROBERT R. WILSON.

Le Progrès des Institutions Pénales. By André Toulemon. Paris: Recueil Sirey, 1928. pp. iv, 245. 40 fr.

This essay, being professedly one in criminal sociology, has only indirect relation to the field of international law in connection with extradition and international penal law. Starting with the assertion, rather startling to the political scientist, that "society appears as organized with the first condemnation legally pronounced and judicially executed—from the first capital execution, that man began to differ from the wolf," the author proceeds to develop as a thesis the doctrine that the so-called law of increasing spiritualization operates in the development of penal institutions as elsewhere in human activities, through private vengeance to public vengeance, when by the influence of a humanitarian philosophy the modern conceptions are arrived at; so that the progress of penal institutions has passed through three phases—the brutal, the sentimental and the reasonable. "Thus penal institutions, like humanity, follow, with progress, the ascendant march of the sensible to the reasonable, not, alas, without recession or return, and the last phase has produced the science of punishment," sociological and psychological, with a reëxamination of the nature of crime and of criminal responsibility. All of this seems fairly obvious, and yet just what there is of a law of increasing spiritualization is not apparent. Certainly some generalizations of the author do not seem to be justified. In the development of criminal procedure, according to him, the jury is the mark of the sentimental period. Cer-

tainly no historian of English law would admit the truth of the following: "The institution of the jury was invented so as to replace the ordeal condemned by the Lateran Council." The final aim of this "law of increasing spiritualization" is obviously the abolition of the death penalty, as to which the author has no doubts. All in all, this essay is based largely on sentiment and constructed around the works of a series of authors, notably Tarde and Lombroso, without seemingly adding much to one's knowledge of the subject. At best it is an entertaining sketch.

J. S. REEVES.

Resident Orientals on the American Pacific Coast. Their Legal and Economic Status. By Eliot Grinnell Mears. Chicago: University of Chicago Press, 1928. pp. xvi, 545. Index. $3.00.

This is a publication by the University of Chicago Press of a book formerly published under this title by the Stanford University Press and previously reviewed in this JOURNAL (July, 1928, Vol. 22, p. 711). The book contains nineteen chapters dealing with the international, legal, constitutional, property, professional, occupational and social problems and relations growing out of the residence of Orientals on the American Pacific Coast. The book is attractively bound and is a genuine contribution to the literature on the general subject of aliens in the United States.

From Versailles to Locarno, A Sketch of the Recent Development of International Organization. By Harold S. Quigley. Minneapolis: University of Minnesota Press, 1927. pp. 170. Index.

The object of this book is to "present as simply as possible the essential facts about the institutions comprising the League of Nations and their relations to each other," and also to bring together in the appendices a collection of documents on international organization. The second object of this book has been more successfully achieved than the first. The appendix includes excerpts from the Hague Convention of 1907 for the Pacific Settlement of International Disputes; the Covenant of the League; the Geneva Protocol; the Statute of the Permanent Court of International Justice; the American Reservations; the Conference of Signatories Report; the Locarno Pacts; and Part XIII of the Treaty of Versailles, relating to the International Labor Organization. The first part of the book attempts to discuss Locarno, the Council and the Assembly of the League, the Secretariat, the Labor Office and the World Court in 75 pages. The account may be of interest to elementary students. Unfortunately it is marred by a number of incorrect statements. It is inaccurate to say that the number of permanent (he probably meant non-permanent) seats on the League Council was increased to nine (p. 13); the Council's recommendations in regard to the protection of minorities in the Aaland Islands were not embodied in a treaty (p. 33); Vilna is not Polish

by nationality, but apparently Jewish (p. 34); Italy did not pay an indemnity to Greece in the Corfu affair (p. 35); there is no League Commission in Danzig (p. 50). The account of Mediterranean politics does not mention what is perhaps the most delicate issue of all: the question of Tunis.

Le Régime Juridique du Danube Maritime devant la Court Permanent de Justice Internationale (James Vallotton, Lausanne, 1928, pp. 64), is a view of Advisory Opinion No. 4 concerning the jurisdiction of the European Commission of the Danube between Galatz and Braila. The author considers the questions before the Court of International Justice with the acts from which these arose, giving some critical comment upon the main points. The natural effort of riparian states to control their rivers is understandable, as is the distinction between the point of view of a non-political technical commission as contrasted with a political non-technical commission. When one considers the voluminous documentation of this case, it is very helpful to have Mr. Vallotton's brief treatment available.

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Boeckel, Florence Brewer. *Between War and Peace.* New York: Macmillan Co., 1928. pp. x, 591. Index. $2.50.

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Bullard, Arthur. *American Diplomacy in the Modern World.* Philadelphia: University of Pennsylvania Press, 1928. pp. 127. $1.50.

Burns, C. Delisle. *A Short History of the World.* New York: Payson & Clarke, Ltd., 1928. pp. xiv, 473. Index. $3.50.

[1] Mention here does not preclude a later review.

Cabañas, Joaquín Ramirez. *Las Relaciones entre Mexico y el Vaticana.* (Archivo Histórico Diplomático Mexicano, Num. 27.) Mexico: Publicaciones de la Secretaria de Relaciones Exteriores, 1928. pp. xciv, 237. Index.

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War Debts—An American View. By Philip Dexter and John Hunter Sedgwick. New York: Macmillan Co., 1928. pp. viii, 173.

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REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

Bryn Mawr College

Revue de Droit International et de Legislation Comparée. 1928. Nos. 1–2.

L'affaire du "Lotus" devant la Cour permanente de justice internationale, by J. H. W. Verzijl (pp. 1–32), after surveying the facts of the case and the points of law involved, sums up the conclusions to be drawn from the decision, notably the difficulty of making our present somewhat vague general principles an adequate standard of justice for the adjudication of specific disputes. *Justice et Médiation internationales* (première partie), by C. De Visscher (pp. 33–82), examines in detail the present weaknesses of international justice and the means of remedying them,—the reservations in arbitration treaties, the classification of disputes, the right of international tribunals to determine their own jurisdiction, and the codification of international law in relation to the defects in the law demonstrated by recent cases, in particular the "Lotus" case. *Extension de l'arbitrage obligatoire et competence obligatoire de la cour permanente de justice internationale*, by A. Hammarskjöld (pp. 83–99), contains a number of valuable practical suggestions from the Secretary of the Court in reply to a questionnaire submitted by a commission of the Institute of International Law. *L'assurance obligatoire des émigrants*, by F. Muûls (pp. 100–112), seeks to show that the insurance of emigrants against the risks of the voyage is a matter of international concern. *Le Français et la paix*, by A. Counson (pp. 113–123), eulogizes French as a diplomatic language, taking as its text three recent volumes by Scott, Roumiguière and Brunot. *L'affaire du Lotus*, by R. Ruze (pp. 124–156), criticizes the decision in detail and hopes that it will prove the occasion of obtaining better guarantees for merchant vessels. *Note sur la doctrine de Monroe*, by T. Baty (pp. 157–172), contains some fresh observations from an original thinker. *Classification, immunités et privilèges des agents diplomatiques* (première partie), by F. Deák (pp. 173–206), seeks to determine how far the ancient practice should be modified to meet modern conditions before an attempt is made to draw up a code on the subject.

Ibid., No. 3. *L'excès de pouvoir de juge arbitral dans le droit international public*, by A. Verdross (pp. 225–242), after an examination of past practice and existing conventions reaches the conclusion, among others, that an arbitration tribunal may in the absence of formal authority pass upon its

own jurisdiction and proceed thereupon to a decision upon the merits of the case. *Justice et médiation internationales* (suite et fin), by C. De Visscher (pp. 243–262), deals with the mediatory action of the Council of the League of Nations as an agency of international justice, insisting upon its value in the presence of the present weaknesses and defects of arbitration. *Differends justiciables et non-justiciables* (première partie), by J. Hostie (pp. 263–281), begins with an examination of negative definitions, taking as a text the report presented by Brown and Politis to the Institute of International Law in 1922 in which three grounds are offered as excluding a dispute from judicial settlement, namely, the absence of a rule of law, generally recognized, applicable to the dispute, the impossibility of deciding the dispute without taking account of the general principles of justice and equity, and the necessity of effecting an adjustment of interests. *La valorisation des avoirs en numeraire dans la jurisprudence des Tribunaux arbitraux mixtes*, by M. Archambault (pp. 282–331), deals with a technical but much discussed detail of the provisions of Article 294 of the Treaty of Versailles calling for the disposition of "cash assets" belonging to the enemy and taken over by the offices established for verification and compensation. *Les projets de convention élaborés par le Comité d'arbitrage et de securité*, by R. Erich (pp. 332–337), examines the series of model treaties prepared by the League of Nations Committee on Arbitration and Security which met at Geneva, February 20 to March 7, 1928, and discusses the connection between the proposed obligations and those already assumed under the Covenant of the League. *Le droit international public envisagé comme source du droit interne hellénique*, by C. G. Tenekides (pp. 338–345), points out that Greek jurisprudence by a decree of the Areopagus in 1896 adopted the "radical and bold conception" that international law is of itself part of the law of Greece without the intervention of constitutional or legislative provisions. The character attributed on that occasion to the principle of the inviolability of ambassadors, says the writer, should be extended to other principles of international law.

JOURNAL DU DROIT INTERNATIONAL, January–February, 1928.

Théorie générale des conflits de juridiction, by E. Bartin (pp. 5–19), points out that the principles governing the conflict of laws are but half of the problem of international private law and that the other half consists in solving the conflict of jurisdictions by delimiting the sphere of national sovereignty as against that of a foreign country. (To be continued.) *Application des traités internationaux au régime douanier chinois*, by G. Padoux (pp. 20–29), raises the difficult question, presented for the first time in China, whether the consular courts have authority to pass upon the stipulations of international treaties in case of their non-observance by the Chinese authorities, and points out the divergent answers given by the British, Japanese and American courts. *De la nationalité des Sociétés*, by L. Mazeaud (pp. 30–66), defends in detail and with elaborate references to French decisions

the thesis that corporations have a nationality and that the criterium adopted by the courts, following the pre-war tradition, is sound.

Ibid., March–April, 1928. *La sixième conférence de La Haye et Droit international privé*, by L. Julliot de la Morandière (pp. 281–295), undertakes to set forth the point of view of the French delegation upon the various questions which came before the conference which met at the Hague in January, 1928. Special attention is given to the draft treaties on testamentary and legal succession and on contracts of sale. The writer expresses confidence in the progress made towards the final adjustment of conflicts of law. *Le projet de convention de la Haye de 1925 concernant la reconnaissance et l'exécution des jugements civils*, by M. Petitpierre (pp. 296–302), holds that in spite of minor criticisms that may be made, the draft treaty represents very liberal ideas and may well serve as a model for states which seek to regulate by treaty the subject of the recognition and execution of judgments in civil cases. *De l'exécution des jugements étrangers en Turquie*, by E. R. Salem (pp. 303–314), gives a résumé of the new code of civil procedure of October 2, 1927, in respect to the execution of foreign judgments in Turkey. *La théorie du renvoi quant à la loi applicable à la capacité des personnes dans le projet de code de Droit international de l'Amérique latine*, by M. Philonenko (pp. 315–328), deals with the question whether nationality or domicil should be made the deciding factor in disputes as to the status and capacity of persons in suits before local courts. The writer regrets the action of the committee in rejecting the doctrine of *renvoi* in favor of a fixed rule to be determined by national law. *La structure juridique de la Société des Nations*, by J. Nisot (pp. 329–339), accepts the League of Nations as an international person *sui generis*. Waiving as of no interest the question whether the League is a super-state, the writer points out that as an international person the League is legally superior to its member states only in so long as they are willing to have it be so by accepting its decrees and continuing it in existence. *Le nouveau règlement de conciliation et d'arbitrage de la Chambre de commerce internationale*, by R. Arnaud (pp. 340–346), explains the procedure before the arbitration court of the International Chamber of Commerce under the new regulations of January 1, 1928.

Ibid., May–June, 1928. *Les emprunts internationaux et le cour forcé*, by H. Capitant (pp. 561–565), criticizes a decision of the Cour de Paris with respect to the payment of a loan in depreciated paper currency in a case where the conditions of the contract were not explicit that payment be made in gold. *La protection de la propriété immobilière des étrangers*, by J. C. Witenberg (pp. 566–583), raises the question, to which post-war problems of taxation and land reform have given a new meaning and a greater importance, whether a state is obliged under international law to admit aliens to ownership of real property, and assuming that aliens are actually owners of real property what is the jurisdiction of the state over that property. Reference is made to American cases. *Des recours ouverts aux particuliers contre la*

Société des Nations, by M. Oudinot (pp. 584–591), discusses the way in which an individual, not being able to sue the League of Nations in a national court, may take steps to obtain redress from the Council or the Assembly of the League. *Un étranger peut-il acquérir un domicil en France depuis la loi du 10 août 1927 sur la nationalité*, by J. Valery (pp. 592–597), maintains that as a result of the law of August 10, 1927, an alien may now without special authorization obtain a legal domicil in France. *Cour mixtes de Shanghai*, by G. Padoux (pp. 598–607), outlines the composition and jurisdiction of the Provisory Court of Shanghai established to hear civil and criminal cases within the concession, except those coming within the consular jurisdiction of the so-called "treaty powers." *Le paiement des dettes contractées en monnaies étrangères, en droit turc*, by E. Salem (pp. 608–626), contrasts the provisions of the new Turkish codes regulating the payment of debts contracted in foreign money with the law of Belgium, France, Italy and Switzerland.

REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, January, February, March, 1928.

Remarques à propos de l'arrêt du T. A. M. du 10 janvier, 1927, by T. Sobolewski (pp. 5–9), is a reply to an article by G. Scelle in an earlier number of the *Revue* dealing with the decision of the Roumanian-Hungarian mixed arbitration tribunal in the case of the Hungarian optants. *L'Extradition des étrangers*, by de Saint-Aubin (pp. 10–31), explains in detail the provisions of the French law of March 11, 1927, which the writer describes as constituting "a veritable revolution" in the method hitherto adopted for the extradition of fugitive criminals. *L'Excès de pouvoir du T. A. M. et la compétence du Conseil de la S. D. N. dans l'affaire des Optants hongrois*, by H. Capitant and L. Trotabas (pp. 32–55), reaches the conclusion that the tribunal exceeded its powers in the case and that the proper procedure for the settlement of the dispute should be by intervention of the Council of the League of Nations to which exception has been taken by both parties on different grounds. *Elihu Root*, by J. Teyssaire (pp. 56–60), is a beautifully phrased tribute to the dean of American international lawyers. *Les questions de travail dans les territoires sous mandat*, by J. Goudal (pp. 90–107), surveys the activities of the International Labor Bureau and the Mandates Commission in connection with the labor problem in territories under mandate and finds hope for a successful outcome of their efforts to improve conditions. *L'Institut de droit international, Session de Lausanne, 1927*, by J. B. Scott (pp. 108–132), summarizes the work of the session in the light of the high mission of the Institute since its inception to prepare the way for the codification of international law so urgently needed. *La Codification du droit international*, by F. J. Urrutia (pp. 133–143), continues the study begun in an earlier number and deals principally with the draft projects of the American Institute of International Law.

Ibid., April–May, 1928. *La doctrine américaine en matière de reconnaissance de gouvernements étrangers*, by Noël-Henry (pp. 201–267), deals in great detail with the legal and political issues raised by the American doctrine in regard to the recognition of foreign governments. Is the organ of government competent to give recognition and how far is it free to act? Does the decision of the competent authority bind the courts to apply the same rule? Is the competent authority free to use its discretion as a matter of international law? The writer (who is also the author of a volume on the subject) approves on the whole the principles followed by the United States and believes that rules may be deduced from them valuable for other states. *Litige au sujet de la compétence des tribunaux dantzikois*, by L. LeFur (pp. 268–283), explains the points involved in the dispute between Poland and the Free City of Dantzig concerning the application of Article 104 of the Treaty of Versailles and Article 22 of the subsequent treaty between Poland and Dantzig. *Changements collectifs de nationalité*, by C. Carabiber (pp. 284–293), explains and condemns the provisions of the treaty of January 30, 1923, between Greece and Turkey relative to the exchange of populations.

Ibid., June–July–August, 1928. *L'affaire du Lotus*, by J. F. Williams (pp. 361–376), limits itself to observations upon points of procedure—the general question of criminal jurisdiction, the *locus delicti*, and certain items differing from Anglo-Saxon law. *Les travaux du Comité d'arbitrage et de sécurité et l'interpretation du Pacte de la S. D. N.*, by C. Rousseau (pp. 377–410), examines in detail the six drafts of arbitration and security treaties prepared by the committee and shows their relation to the principles laid down in the Covenant of the League. The writer concludes with observations upon the necessity of interpreting the obligations of the Covenant in the light of political conditions, and quotes Sir Austen Chamberlain, to the effect that "theory follows much more upon practice than practice upon theory," to emphasize that the constant preoccupation of the committee was "less to attain an immediate and definitive result than to discover a method." *La responsabilité de l'Allemagne, du fait des confiscations pénales opérées en territoire polonais pendant la guerre*, by C. Sachocki (pp. 411–432), seeks to show that Article 300 of the Treaty of Versailles providing for the payment of damages to individuals for injuries inflicted by the enemy constitutes a new principle of international law, and the mixed arbitration tribunals established to hear such cases mark a new stage in the development of the law. *La conférence diplomatique pour l'abolition des prohibitions et restrictions douanières*, by J. Lhomme (pp. 433–446), after describing the work of the conference at Geneva in 1927 points out that one result of the conference was that henceforth states will make their claims for protective tariffs and other restrictions in the open, and that an agreement was reached at the conference upon many lesser matters which gives promise of further progress in modifying the attitude of national economic "autarchy." *Les concessions et le Traité de Lausanne*, by J. Teyssaire (pp. 447–465), analyzes the various

forms of concessions granted by Turkey in the years preceding the war, shows how the Turkish Government modified the demands of the Allied Governments at Lausanne and succeeded in securing an agreement, Protocol XII, which provides a procedure of "conciliation" for the settlement of post-war claims. *Le droit international et l'Affaire des mitrailleuses de Szent Gottard*, by E. Kertész (pp. 466–500), presents in detail the facts of the famous shipment of machine guns from Italy to Hungary and argues that the attitude of the Hungarian Government was in perfect conformity with its obligations under the Treaty of Trianon.

Ibid., September–October, 1928. *De la reciprocité en matière d'extradition*, by H. Donnedieu de Vabres (pp. 553–570), points out the contrast between the French law of March 10, 1927, and the proposed German law and seeks to show that whatever advantages may have attached to the reciprocity clause in the treaty relations of the past, the clause is out of keeping with the newer tendency to regulate extradition by national legislation, giving promise of ultimate international regulation. *L'aspect international du problème des stupéfiants manufacturés*, by M. Liais (pp. 571–590), undertakes to explain why opium, morphia and other drugs call for an international solution by reason of the monopoly which certain countries have in the production of the raw materials of which the drugs are made. *La lutte internationale contre l'esclavage*, by J. Goudal (pp. 591–625), surveys at length the progress of the international war against slavery and shows that the coöperation between the League of Nations and the International Labor Bureau gives promise of bringing about the complete abolition of the survivals of slavery in the modern world. *La question de Wilno*, by S. Kutrzeba (pp. 626–644), exposes, from a point of view sympathetic with the Polish claims, the facts attending the Polish possession of Vilna and the international documents bearing upon the case.

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ARBITRATION AND CONCILIATION IN PAN AMERICA

By James Oliver Murdock

Member of the New York Bar [1]

The International Conference of American States on Conciliation and Arbitration, which met in Washington from December 10, 1928, to January 5, 1929, was characterized by one of the delegates to the conference as the Locarno of the New World. Shortly after the signing of the General Pact for the Renunciation of War, we find the nations of the Western Hemisphere taking the logical next step of providing machinery for the pacific settlement of all international disputes. "It is quite obvious that it is not sufficient to renounce war, unless we are ready to have recourse to the processes of peace." [2] Here is concrete evidence of the good faith of the American Republics to provide a clean-cut substitute for war as an instrument of national policy. The necessity for the development of machinery for international pacific settlement has been demonstrated to the present generation by the fact that the whole nature of the institution of war changed when man became a scientist, an engineer, and a mechanic. Mass production, under the stimulus of intensive research, has made possible the production of instruments of destruction which threaten to destroy civilization, unless international social relations can be brought within the control of law. While President-elect Hoover was making his good-will, personal-relations tour in South America, eminent jurists from twenty of the American Republics were meeting in Washington to set up the framework for the stabilization of international relations.

BOLIVIA-PARAGUAY INCIDENT

On the opening day of the conference, war seemingly became imminent between two nations represented at the peace table. The settlement of the longstanding Chaco boundary dispute between Bolivia and Paraguay through the mediation of Argentina was interrupted by an alleged violation of the neutralized boundary zone. The agenda of the conference had sole reference to the preparation of treaties to provide for pacific settlement in the future. But the delegates were confronted with a condition demanding immediate action. Jurists could not meet in solemn assembly to discuss theoretically means of peaceful international adjustment, while war was

[1] The article presents the personal opinions of the author, who is an Assistant Solicitor of the Department of State and acted as the legal advisor to the American Delegation to the International Conference of American States on Conciliation and Arbitration.

[2] Mr. Charles Evans Hughes, Provisional Minutes of the Conference, Arbitration Committee, Jan. 3, 1929, p. 16.

imminent in their own territories. Acting in the cause of peace and for its self-preservation, the conference adopted a resolution on December 10, 1928, creating a special committee to deal with the impending conflict.[3] Telegrams were despatched to the governments of the sister Republics of Bolivia and Paraguay, expressing the keen aspiration and hope which was fostered by the members of the conference that the present difficulties should be adjusted peacefully in the spirit of justice, concord, and fraternity. The special committee reported on December 14, 1928. Thereupon the conference resolved:

> 1. To proffer its good offices to the interested parties for the purpose of promoting suitable conciliatory measures with the aim of preserving the principle of conciliation and arbitration as a solid foundation of international life.
> 2. To continue the special committee charged with considering and reporting to the conference on the developments which may occur in the incident between the Republics of Bolivia and Paraguay.[4]

Pursuant to this resolution, the good offices of the conference were proffered to the contending nations. Bolivia had not ratified the Gondra Treaty of 1923 to Prevent Conflicts Between the American States. The contending nations were only obligated not to resort to war as parties to the Covenant of the League of Nations. At the same time that means were being sought in the Western Hemisphere for the pacific settlement of this controversy, the Council of the League of Nations, in session at Lugano, made a similar appeal. Public opinion throughout the world was thus quickly crystalized in favor of a pacific solution. The net result was the signing in Washington of a protocol between Bolivia and Paraguay on January 3, 1929,[5] which provided for the appointment of a commission of investigation and conciliation to bring about a settlement of the immediate controversy. The solution of the underlying boundary dispute remains as a separate question to be dealt with after the recent controversy has been settled.

While the special committee worked strenuously to arrange for the conciliation of the differences of Bolivia and Paraguay, the conference was organized into two general committees, one on conciliation and the other on arbitration. These committees worked in a spirit of friendly reality. They prepared a convention and a treaty—a General Convention of Inter-American Conciliation and a General Treaty of Inter-American Arbitration. The Arbitration Committee also prepared a Protocol of Progressive Arbitration. These three documents were signed by the delegates of the twenty nations represented at the conference, including Bolivia and Paraguay.[6]

[3] Conference Report, Final Act, 6th Resolution.

[4] *Ibid.*, 7th Resolution.

[5] Published in collection of documents of The International Conference of American States on Conciliation and Arbitration, Govt. Printing Office, Washington, 1929, pp. 90–97; printed in Supplement to this JOURNAL, p. 98.

[6] These documents are reprinted in the Supplement to this JOURNAL, pp. 76–89.

PAN AMERICAN BACKGROUND OF THE CONFERENCE

Before beginning a detailed discussion of the treaties, it is essential to outline the international forces which make for and against Pan American solidarity. Without an appreciation of these factors, the difficulties and achievements of the conference cannot be appraised. The forces which tend to draw apart the American Republics are racial, cultural and economic. The Latin temperament and culture of the republics to the south vary in many respects from Anglo-Saxon temperament and culture. Differences in language and literature are a barrier to ready understanding and mutual appreciation. Wide differences in economic development exist, resulting in inequalities in standards of living and international psychological complexes. Finally, differences in climate play an important rôle in that they diversify racial and economic development. Forces which make for Pan American solidarity are geographical unity based upon propinquity, rapid communications, and trade. The Panama Canal has brought the west coast of South America into close relations with the highly industrialized section of the United States. The exchange of reciprocal products of the tropical and temperate zones forms a natural basis for trade in raw materials. The need of the agricultural communities to the south for manufactured products stimulates trade. Furthermore, the common political background and constitutional structure of all the American Republics tends towards a sympathetic understanding in the field of politics. Based upon these constructive forces, Pan Americanism has been developed to cement the solidarity of the Republics of the New World. Pan American unity originating in South America with Bolívar and San Martín, was stimulated by Henry Clay, and the present Pan American Conferences were initiated by James G. Blaine in 1889.

PACIFIC SETTLEMENT AND PREVIOUS CONFERENCES

From the time the first Pan American Conference of the present series met in Washington in 1889, intermittent efforts have been made to provide machinery for the pacific settlement of international disputes. At the 1889 conference an arbitration treaty was prepared, which provided for the settlement of all controversies, except those which may imperil the independence of a state, in which case arbitration was to be optional for the nation whose independence might be imperiled but obligatory for the adversary state.[7] This treaty was never ratified by the signatory Powers. At the second conference of 1902 in Mexico City an obligatory arbitration treaty was signed by ten of the delegations to the conference, there being a division of opinion as to whether there should be obligatory arbitration or an arbitration treaty which contained exceptions so broad as to practically make resort to it purely

[7] International American Conference, Report and Recommendations, Washington, 1890 pp. 2–5.

voluntary.[8] A protocol of adherence by the American Republics to the Hague Convention of 1899 for the Pacific Settlement of International Disputes was signed.[9] This conference also prepared a treaty for the arbitration of pecuniary claims of their respective citizens.[10] At the third conference of 1906 in Rio de Janeiro a resolution was adopted which recommended full coöperation by the American Republics in the formulation of an effective arbitration convention at the forthcoming Hague Conference of 1907.[11] A convention was signed which provided for the extension to December 31, 1912, of the Pecuniary Claims Arbitration Treaty of 1902.[12] The fourth conference of 1910 in Buenos Aires extended the life of the Pecuniary Claims Convention by the adoption of a new convention to remain in force indefinitely.[13] In 1923 at the fifth conference in Santiago a resolution was adopted favoring the development of conciliation, judicial settlement, and arbitration.[14] At this conference there was signed a general treaty providing for commissions of inquiry, called the Gondra Treaty after its author, or the Treaty to Avoid or Prevent Conflicts Between the American States.[15] The Costa Rican delegation submitted a project for a Permanent American Court of Justice, which was referred to the International Commission of Jurists at Rio de Janeiro.[16]

In 1924 the American Institute of International Law prepared a project on pacific settlement and a project on a Pan American Court of Justice.[17] The International Commission of Jurists in 1927 prepared a project on pacific settlement of international conflicts to be submitted to the Sixth Pan American Conference.[18] When the Sixth Pan American Conference

[8] Second International Conference of American States, Report of Delegates of United States, Senate Doc. No. 330, 57th Cong., 1st Sess., 1902, pp. 8–12. The treaty is reprinted in the Supplement to this JOURNAL, Vol. 1, p. 299.

[9] *Ibid.*, pp. 36–39.

[10] *Ibid.*, pp. 139–143; Treaties, Conventions, etc., Malloy, Vol. 2, p. 2062; Supplement to this JOURNAL, Vol. 1, p. 303.

[11] Report of the Delegates of the United States to the Third International Conference of American States, Rio de Janeiro, 1906, pp. 97–98. Text of the resolution in Supplement to this JOURNAL, Vol. 1, p. 307.

[12] *Ibid.*, pp. 71–73; Treaties, Conventions, etc., 1910–1923, Vol. III, 2879.

[13] Fourth International Conference of American States, Report of American Delegates, Senate Doc. No. 744, 61st Cong., 3d Sess., pp. 138–144; Treaties, Conventions, etc., 1910–1923, Vol. III, 2922; Supplement to this JOURNAL, Vol. 5, p. 17.

[14] Report of the Delegates of the United States of America to the Fifth International Conference of American States, Santiago, Chile, 1924, pp. 133–136.

[15] *Ibid.*, pp. 110–124; U. S. Treaty Series, No. 752; Supplement to this JOURNAL, Vol. 21, p. 107.

[16] *Ibid.*, p. 8; for text see Codification of American International Law, Projects of Conventions prepared at request of Governing Board of Pan American Union, Washington, 1925, pp. 119–121; and Special Supplement to this JOURNAL, Vol. 20, p. 385.

[17] Codification of American International Law, *ibid.*, pp. 100–114; Special Supplement to this JOURNAL, Vol. 20, pp. 368, 374.

[18] Int. Comm. of Jurists, Rio de Janeiro Session, Apr. 18, 1927, Public Int. Law, Pan American Union, 1927, pp. 36–40; Special Supplement to this JOURNAL, Vol. 22, p. 268.

met at Havana in 1927 the report of the subcommittee on the pacific settlement of international disputes was presented only a few days before the time fixed for the adjournment of the conference.[19] Rather than attempt to deal with this important question in a summary manner, the Habana Conference adopted a resolution [20] providing for the calling of a Conference on Conciliation and Arbitration, which reads as follows:

> The Sixth International Conference of American States,
> *Resolves:*
> Whereas the American Republics desire to express that they condemn war as an instrument of national policy in their mutual relations; and
> Whereas the American Republics have the most fervent desire to contribute in every possible manner to the development of international means for the pacific settlement of conflicts between states:
> 1. That the American Republics adopt obligatory arbitration as the means which they will employ for the pacific solution of their international differences of a juridical character.
> 2. That the American Republics will meet in Washington within the period of one year in a conference of conciliation and arbitration to give conventional form to the realization of this principle, with the minimum exceptions which they may consider indispensable to safeguard the independence and sovereignty of the states, as well as matters of a domestic concern, and to the exclusion also of matters involving the interest or referring to the action of a state not a party to the convention.
> 3. That the governments of the American Republics will send for this end plenipotentiary jurisconsults with instructions regarding the maximum and the minimum which they would accept in the extension of obligatory arbitral jurisdiction.
> 4. That the convention or conventions of conciliation and arbitration which may be concluded should leave open a protocol for progressive arbitration which would permit the development of this beneficent institution up to its maximum.
> 5. That the convention or conventions which may be agreed upon, after signature, should be submitted immediately to the respective governments for their ratification in the shortest possible time.

Pursuant to the above resolution the Secretary of State of the United States called a Conference on Conciliation and Arbitration to meet in Washington on December 10, 1928. At this conference, for the first time, the American Republics were convened with the sole purpose of the preparation of treaties providing for the pacific settlement of international disputes.

This résumé of the work of the six Pan American Conferences shows how painfully slow progress has been in the development of definite international machinery for pacific settlement. Unratified multilateral arbitration treaties and resolutions have been the rule. The first real advance was made through adherence to the Hague Conventions for the Pacific Settlement of International Disputes. To-day 19 of the American Republics

[19] Report of the Delegates of the United States of America to the Sixth International Conference of American States, Habana, 1928, p. 20.

[20] *Ibid.*, p. 310.

have ratified or adhered to the Hague Convention of 1899[21] and ten states have ratified or adhered to the Hague Convention of 1907.[22] The Pecuniary Claims Convention and the Gondra Treaty of 1923 were the only general multilateral Pan American treaties providing machinery for arbitration and inquiry up to the time the conference of 1928 met in Washington. Of course, there are numerous bilateral arbitration treaties between the American Republics. Thirty-six arbitration treaties are in effect between Latin American Republics.[23] Five of the Root arbitration treaties are in force between the United States and American Republics.[24] Eight of the Bryan treaties for the advancement of peace are in effect.[25] A treaty, similar to the Bryan treaties, is in force between the United States and four of the Central American Republics.[26]

GENERAL CONVENTION OF INTER-AMERICAN CONCILIATION [27]

The Treaty to Prevent Conflicts Between American States,[28] the Gondra Treaty, signed at Santiago in 1923, provided for commissions of inquiry, but it failed to make provision for these commissions to exercise conciliatory functions. While the commissions were authorized to inquire into and report on the facts, no power was given them to use their good offices to bring the parties to a dispute into agreement. This omission caused many of the delegates to the recent conference to think that the commissions would be impotent to make a conciliatory effort to bring the parties together. It was realized that there are important international questions in the domain of policy, concerning the vital interests of states, which have not been sufficiently defined by international law to permit their being submitted to arbitration. Therefore, the field of conciliation for political questions was a most important one in which to provide means for the pacific adjustment of differences. It is precisely those disputes, regarding questions which have not been sufficiently defined by international law, which offer the

[21] The Hague Conventions and Declarations of 1899 and 1907, James Brown Scott, pp. 230–232.

[22] *Ibid.*, pp. 236–239.

[23] Latin American Commission of Inquiry and Arbitration Treaties, Summaries and Tables, June, 1928, James Oliver Murdock, Department of State Library.

[24] Treaties, Conventions, etc., of the United States, Vol. 2, p. 1451, Peru, 1908; Vol. 1, p. 945, Haiti, 1909; Vol. III, p. 2859, Uruguay, 1909; p. 2504, Brazil, 1909; p. 2574, Ecuador, 1909.

[25] Treaties, Conventions, etc., Vol. III, p. 2499, Bolivia, 1915; p. 2505, Brazil, 1916; p. 2509, Chile, 1916; p. 2575, Ecuador, 1916; p. 2788, Paraguay, 1915; p. 2795, Peru, 1915; p. 2860, Uruguay, 1915; p. 2865, Venezuela, 1921.

[26] Convention between the United States and Central American Republics for the Establishment of International Commissions of Inquiry, signed at Washington, Feb. 7, 1923, U. S. Treaty Series, No. 717; Supplement to this JOURNAL, Vol. 17, p. 108. The United States, Costa Rica, Guatemala, Honduras, and Nicaragua have ratified this treaty. El Salvador has not ratified.

[27] The full text of this convention will be found in the Supplement to this JOURNAL, p. 76.

[28] U. S. Treaty Series, No. 752; Supplement to this JOURNAL, Vol. 21, p. 107.

greatest difficulties to pacific settlement. Therefore, the conference was confronted with the problem of amplifying the 1923 inquiry treaty, and yet avoiding the necessity of the multiplication of international commissions. The Gondra Treaty had already been ratified by fifteen states.[29] It would require a needless multiplicity of machinery to make an independent treaty with independent commissions to provide conciliatory procedure. Therefore, the happy plan was seized upon of making the conciliation convention supplementary to the 1923 commission of inquiry treaty. The able reporter for the Conciliation Committee of the conference, Mr. Varela of Uruguay, stated in his report:

> The accompanying draft convention constitutes, then, essentially an amplified complement of the Gondra Treaty, and in such sense it should be clearly understood that it is not admissible for the Convention of Conciliation to be ratified by a state unless the Gondra Treaty be previously or simultaneously ratified. As a general rule, and whenever this is proper, investigation precedes conciliation and the commissions organized in accordance with Article 4 of the Gondra Treaty are first and foremost commissions of investigation. It is well understood that this does not preclude the commissions making use of the right to try conciliation which is authoritatively conferred upon them by paragraphs 1 and 2 of Article 4 of the draft convention, but, we again repeat, the process of pacific settlement normally begins with investigation and is continued with conciliation.[30]

The conciliation convention provides for the submission to that procedure of controversies of any kind which may have arisen or may arise. In its scope the convention is broader than the Gondra Treaty, in which the following exceptions appear in Article 1:

> It is understood that in disputes arising between nations which have no general treaties of arbitration, the investigation shall not take place in questions affecting constitutional provisions, nor in questions already settled by other treaties.

In this respect, the conciliation convention is not limited. Provision is, therefore, made in Articles 14 and 15 of the conciliation convention for the commissions functioning in such cases to act nevertheless in a conciliatory capacity. To this extent, provision was made for conciliation, without investigation.

Article 3 of the conciliation convention provides that the permanent commissions consisting of the three senior American diplomatic agents in Montevideo and Washington shall exercise conciliatory functions. This provision was inspired by the fact that the Bolivian-Parguayan controversy

[29] United States, 1924; Brazil, 1924; Chile, 1925; Costa Rica, 1928; Cuba, 1925; Dominican Republic, 1928; Guatemala, 1924; Haiti, 1926; Mexico, 1927; Panama, 1928; Paraguay, 1926; Peru, 1928; Salvador, 1928; Uruguay, 1928; Venezuela, 1925.

[30] Provisional Minutes of the Conference, Conciliation Committee, Jan. 3, 1929, p. 3.

arose while the conference happened to be in session. The delegates felt that there should be a permanent body to do precisely in the future what the conference had done for Bolivia and Paraguay. The fact that the conference was meeting when the conflict broke out made it possible for immediate action to be taken during the danger period when feeling was running high. Therefore, the permanent commissions in Washington and Montevideo were given conciliatory functions, as well as the special commissions which are to be appointed to inquire into and settle, if possible, a controversy. Some delicacy was felt about conferring upon the permanent commissions the conciliatory function, because of the fear that they might inject themselves unnecessarily into the ordinary conduct of diplomatic relations between states. A clause was, therefore, inserted in Article 3 which provided that the two permanent commissions should act on their own motion, only when it appears that there is a "prospect of disturbance of peaceful relations," that is, when there is imminent danger of a breach of international relations. It was further provided that the two permanent commissions shall have the right to use their conciliatory function at the request of a party to a dispute. In such cases there could be no question of the permanent commissions unnecessarily injecting themselves into diplomatic negotiations, since their action would be predicated upon the request of a party to the dispute. Mr. Hughes stated in this connection:

> Then we thought that as neither party might ask under the Gondra Treaty for the creation of a commission of inquiry, we should at least have some conciliatory process available. Therefore, we recommended that the permanent commissions established under the Gondra Treaty could on their own motion endeavor to effect conciliation. If that is followed by the institution of the proceedings suggested by the Gondra Treaty, well and good; then there will be machinery for investigation and conciliation. But in any event, if there is an exigent case, when there is a chance of a disturbance, a prospect of a disturbance of peaceful relations, there should be in existence some machinery of conciliation. It has been merely a happy chance that this conference was in session at the time of this recent incident in relation to Bolivia and Paraguay. . . .
>
> It is only during the interval that may elapse before a commission of inquiry is organized and conciliation is established that the permanent commissions can thus act. Let them do what they can. We all know what conciliation means. It does not mean imposing anybody's will on any sovereign state. It does mean an effective use of good offices to bring parties, whose peaceful relations are in danger, into an accord.[31]

Article 2 of the treaty provides that the commissions of inquiry to be established pursuant to the provisions of the Gondra Treaty shall likewise have the character of commissions of conciliation. The question as to whether inquiry or conciliation shall come first is by the terms of Article 4 of the treaty left entirely in the hands of the commission, which may begin its

[31] Provisional Minutes of the Conference, Conciliation Committee, Jan. 3, 1929, p. 14.

work with an effort to conciliate or attempt conciliation at any opportune time during the conduct of the investigation into the facts of a controversy. Finally, however, a commission, after conducting its inquiry, is bound to carry out its conciliatory function. This flexible provision does not attempt to tie the hands of a commission in advance as to the best time to initiate an attempt to bring the parties into agreement. It is conceivable that cases may arise in which the probability of conciliating the parties would be greatly enhanced by eliminating an investigation into the facts. The conciliatory functions of a commission are described in Article 6, which states that it shall attempt to procure the conciliation of the differences subject to its examination by endeavoring to effect a settlement between the parties. When the commission has completed its investigation into the facts, it is bound to undertake a conscientious and impartial examination of the questions which are the subject of the controversy, and to set forth in a report the results of its proceedings and to propose to the parties the bases of a settlement for the equitable solution of the controversy.

One of the principle values of this convention is that it provides an ample cooling-off time for the parties, so that their mature judgment may prevail over their emotions. A full year is allowed for an investigation to take place. Pursuant to the provisions of Article 5 of the Gondra Treaty, thereafter a commission, under the provisions of Article 4 of the conciliation convention, has six months additional time in which to carry out its conciliatory functions. Furthermore, under Article 10 of the conciliation convention a commission, in transmitting its report and recommendations to the parties, has the power to fix an additional period of time, which shall not exceed six months, within which the parties shall pass upon the bases of settlement. In all the parties may be thus obligated to delay a period of at least two years before recovering liberty of action. This is all provided the parties do not, in the meantime, according to the provisions of Article 13 of the convention, resort to some other method of specific settlement or settle the case by direct negotiations.

The report and recommendations of a commission under Article 9 do not have the character of a decision or an arbitral award, and are not binding on the parties either as regards the exposition or interpretation of the facts or as regards questions of law. This provision has these effects: It leaves the final decision in the case to the parties and, therefore, should have a tendency to make them willing to submit the most delicate questions to the procedure of conciliation. It has the disadvantage of not necessarily bringing about a definitive solution of a controversy. The recommendations of an impartial commission, however, will carry great moral weight with public opinion and have tremendous persuasive force. While nations may at times shrink from submitting to a judgment, the findings of an impartial commission of conciliation may so appeal to their sense of fair play as to cause states to carry out the recommendations as a matter of honor.

GENERAL TREATY OF INTER-AMERICAN ARBITRATION [32]

The arbitration treaty prepared by the conference was drafted along the lines of the Habana resolution. As the delegates recognized in the conciliation convention that there are certain questions of a political nature which can only be settled through inquiry and conciliation, they also realized that there are questions where international law calls for the application of the judicial process in the settlement of disputes. Where there is an established law to control the decision of a tribunal, there is every reason to permit an international court to apply that rule in much the same manner as rules of law are applied by municipal courts. Legal controversies may thus be settled one by one, without regard to the general political relations of the contending states, according to reciprocally applicable rules of law, after a full presentation of the facts by the parties to a controversy.

The scope of the arbitration treaty is defined in Article 1. It provides for the submission of all differences of an international character which have arisen or may arise between the parties by virtue of a claim of right made by one against the other under treaty or otherwise. This is practically the same definition of juridical questions which was used in the unratified treaty negotiated in 1911 by Secretary of State Knox and Lord Bryce between the United States and Great Britain.[33] It is also the definition which has been used in the recent United States arbitration treaties with France, Germany and other non-American Powers.[34] In addition to the above definition of a judicial question, the following categories of questions of a judicial character were taken from Article 36 of the Statute of the Permanent Court of International Justice:[35]

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute a breach of an international obligation;
(d) The nature and extent of the reparation to be made for the breach of an international obligation.

The last clause of Article 36 of the World Court Statute, which provides that: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court," was not included in the present treaty. This omission would seem to fail specifically to confer upon the tribunal the right to determine whether or not a question is of a political-domestic or international-judicial nature.

Questions which are excepted from the provisions of the treaty are de-

[32] The full text of this treaty will be found in the Supplement to this JOURNAL, p. 82.

[33] 62nd Cong., 1st. Sess., Senate Doc. No. 91, Vol. 30, 6108; Supplement to this JOURNAL, Vol. 5, p. 253.

[34] Congressional Record, 70th Cong., 1st Sess., Vol. 69, No. 124, Thurs., May 10, 1928; U. S. Treaty Series, No. 768; Supplement to this JOURNAL, Vol. 22, p. 37.

[35] Supplement to this JOURNAL, Vol. 17, p. 65.

scribed in Article 2. However, Article 1 of the treaty excepts by definition those questions which are not juridical in their nature, thereby leaving all political questions, which in their nature are not susceptible to arbitral settlement, to settlement by conciliatory procedure. Subsection (a) of Article 2 excepts questions that are within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law. To simply exclude domestic questions generally would have resulted in a failure to recognize the fact that certain angles of so-called domestic questions may have been brought within the control of international law through treaty or otherwise. The exception is thus limited by existing international law at the time a case arises. It is not a vague catch-all, such as the old type of limitation contained in many general arbitration treaties. Mr. Hughes made the following comment on this exception:

> . . . when we come to consider the exceptions which are to be introduced, we have in mind two fields of obligations: those where the obligations are created in the exercise of sovereignty and which fall within the domestic jurisdiction; and the other obligations, which are created by international law and which are not susceptible of final determination through local tribunals without the intervention of an appropriate international tribunal. In other words, where a treaty is concerned, for example, or matters which have given rise to rights under international law, the appropriate resort, if the parties can not dispose of the controversy amicably, is to an international tribunal . . .
>
> So these two sources, domestic jurisdiction and international jurisdiction, stand separate, the one governed by the law of the sovereign state, the other governed by the international law which consists of those principles and rules which states have accepted as governing the relations that exist between them.
>
> When we say in the first exception: "and are not controlled by international law," we have obvious reference to those situations in which matters which would otherwise fall within the domestic jurisdiction have, by reason of an international transaction, through treaty for example, become the subject of international consideration because they import international obligations.[36]

Subsection (b) of Article 2 excepts those controversies which affect the interest or refer to the action of a state not a party to the treaty. Mr. Hughes' remarks are again most illuminating on the interpretation of this exception:

> I appreciate the point which my distinguished friend from Venezuela has made with respect to the award not being binding on third states. That, of course, is true. But if a third state has an interest in the controversy, or if the action of the third state is to be the subject of discussion, it is manifest that there ought not to be an arbitration which draws in that interest or action even though the award might not be binding upon the third state. This is an historical exception which has always been made because it has been recognized that those disputes or controversies between two states which draw in the interest or the action of a third state can not properly be made the subject of arbitration

[36] Provisional Minutes of the Conference, Arbitration Committee, Jan. 3, 1929, p. 17.

> between the two states. The award may not bind the third state, but it is indecorous, it is not in accord with the proprieties of the international community that two states should attempt to resolve a controversy which relates to the action or interest of the third state. It is for that reason that this historic exception was introduced into the treaty, and it was thought advisable to use the same words as those which appear in the Habana resolution.[37]

While it is not an exception to the treaty, it is noteworthy that under the last provision of Article 1, any of the parties, before resorting to arbitration may have recourse to procedures of investigation and conciliation established in conventions then in force between them. This permits any nation desiring to avoid the effects of an arbitral award to delay arbitration pending inquiry and conciliation. It, however, does not relieve the parties to a controversy from resorting to arbitration eventually, should settlement not be secured as a result of resorting to inquiry and conciliation.

The exceptions described above carry out the Habana resolution, which provided that there should be inserted in the treaties the minimum exceptions which the nations may consider indispensable to safeguard their independence and sovereignty. The two definite exceptions made in the treaty are a splendid commentary on the development of the international mind in the last two decades. Catch-all phrases, such as vital interest, national honor, sovereignty, territorial integrity, independence and constitutional questions, were omitted.

The machinery which was created for the selection of a court is provided for in Article 3. The first paragraph of this article permits the parties to agree upon the designation of any type of tribunal. The parties under this clause may have resort to the Permanent Court of International Justice. The advantages of resort to the World Court, which may appeal to the parties and result in bringing cases to that tribunal, are its continuity of judicial responsibility and the fact that eleven independent, carefully selected jurists of the highest standing decide each case. The parties do not become a victim to the prejudices, if any, of a single umpire. The further fact that the court meets at regular sessions in a fixed place, eliminates the principal objections to the uncertainties surrounding a temporary tribunal. However, if the parties fail to agree upon a tribunal, provision is made for the selection of a special court. The important element in such a court is, of course, the fifth arbitrator or the umpire. An advance over older methods for the selection of this all important member of the court was made by taking the matter entirely out of the political sphere. Instead of providing for the designation of the umpire by a chief-of-state friendly to both parties, it is provided that in the event the arbitrators selected by the parties are unable to reach an agreement among themselves for the selection of a fifth American arbitrator, or in lieu thereof, of another who is not, each party

[37] Provisional Minutes of the Conference, Arbitration Committee, Jan. 3, 1929, p. 15.

shall designate a non-American member of the Permanent Court of Arbitration at The Hague, and the two persons so designated shall select the fifth arbitrator, who may be of any nationality other than that of a party to the dispute.

The special agreement, or *compromis*, which governs a particular case is provided for in Article 4. The first paragraph states that the parties to a dispute shall formulate the *compromis* by common accord, in which case they shall clearly define the subject matter of the controversy, the seat of the court, the rules which will be observed in the proceedings and other conditions to which the parties may agree. This provision places the formulation of the *compromis* in the first instance with the parties. No provision is made for the reference of the *compromis* to legislative bodies with a view to securing its advice and consent to ratification. This procedure is in accord with the trend of international arbitration. Of the arbitration treaties registered with the League of Nations, some 60 in number,[38] only two treaties, to both of which the United States is a party, require the submission of the *compromis* to the legislative body.

Of the 36 bilateral arbitration treaties between Latin American States,[39] only those to which Brazil is a party, signed in 1909, 1910, and 1911, require the submission of the *compromis* to a legislative body. Article 48, Chapter 3 of the Brazilian Constitution of February 24, 1891 provides:

> The President of the Republic shall have the sole power . . .
> 16. Initiate international negotiations, conclude agreements, conventions and treaties, *ad referendum* to the Congress . . .

It was apparently not considered, however, that this constitutional provision made it mandatory to submit the *compromis* to the Brazilian Congress, since the arbitration treaties between Brazil and Chile of May 18, 1899,[39] and Brazil and Argentina of September 7, 1905,[39] make no such provision. It is furthermore noteworthy that in recent arbitration treaties between Brazil and Uruguay, December 27, 1916,[39] and Brazil and Peru, July 11, 1918,[39] Brazil departs from the practice in its 1909, 1910, and 1911 treaties. Where a general treaty limits the disputes to be submitted to international judicial questions, there are clearly defined limits as to what questions may be arbitrated. If a general arbitration treaty is intended to impose any international obligation to arbitrate, it would seem that the formulation of a *compromis* requires only a simple executive agreement and not a new treaty.

There are two juridical points of view in the United States as to the *compromis:* the first is that it is simply an executive arrangement of certain details for the arbitration of a particular case, pursuant to the provisions of a general obligatory arbitration treaty. The other view is that the *compromis*

[38] League of Nations, Arbitration and Security, Geneva, C. 653. M. 216. 1927. V., pp. 83–353.

[39] Latin American Commission of Inquiry and Arbitration Treaties, Summaries—Tables, June, 1928, James Oliver Murdock, Department of State Library.

constitutes an independent treaty, which under the Constitution of the United States must be submitted by the President to the Senate to secure advice and consent to the ratification. This latter view would find legal support if the *compromis* were not prepared pursuant to a general arbitration treaty. In the absence of a general arbitration treaty, there being no binding international agreement to arbitrate, each arbitral arrangement ordinarily constitutes an independent agreement. Even in such cases, however, there are numerous instances in which the United States has submitted claims of its citizens against foreign nations to arbitration by means of an executive agreement, the ratification of which was not advised and consented to by the Senate.[40] Provided the existing unique practice of the United States is continued by the appending of a reservation whereby the *compromis* for each case arising under the General Arbitration Treaty must be submitted to the Senate, two views may be taken of this procedure: First, it might be said that the step is only procedural and that the Senate is obligated by the treaty to ratify a *compromis*. The objection to this practice is that it adds an additional step to the already cumbersome processes of international arbitration. The second view is that the Senate may refuse to ratify a *compromis* prepared by the executive pursuant to a general arbitration treaty. If this is the case, there would seem to be no useful purpose served by general arbitration treaties. Nations may, without the formality of a purely voluntary general treaty, have recourse to arbitration at any time. Before the time when general arbitration treaties were concluded, the practice of the submission of an arbitral agreement to a legislative body was in some cases considered constitutionally requisite in the United States. But after ratification by a legislative body of a general arbitration treaty, it would seem that, from a juridical standpoint, rather than from the standpoint of policy, formulation of a *compromis* in the submission of a particular case is no longer a question for a deliberative body but rather one for the executive.

There are precedents where Congress by general legislation has passed laws giving the President powers to deal with matters of foreign relations. An instance is found in the Act of 1794, which empowered the President to levy an embargo, whenever in his opinion the public safety so required, on all ships of the United States or foreign nations in ports of the United States.[41] In 1799 the President was empowered to break off and renew commercial intercourse with France, whenever, in his opinion, the interests of the United States so required.[42] The Canadian Retaliatory Act of 1887 con-

[40] Protocol between the United States and Venezuela, May 1, 1852, Malloy, p. 1842; agreement between the United States and Spain of Feb. 11–12, 1871, Malloy, Vol. 2, 1661; agreement between United States and Germany providing for a mixed claims Commission, Aug. 10, 1922, Malloy, p. 2601. *See* Treaties, Conventions, etc. (Malloy) for numerous other examples.

[41] 1 Stat. at Large, 372.

[42] 2 Stat. at Large, 7–9.

ferred powers upon the President, under specified contingencies, to suspend in his discretion, all commercial intercourse with Canada.[43] The McKinley Tariff Act of October 1, 1890, gave the President power to impose certain duties under specified conditions.[44] In the case of B. Altman and Co. *v.* United States,[45] the court considered the nature of an agreement concluded by the Executive in pursuance of authority conferred by an Act of Congress. The court said:

> While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, Section 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of the two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. It was not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President.

These precedents established a practice whereby the legislative branch of the government may pass the general act laying down definite limitations and may authorize the President to enter into international agreements to carry out express provisions of the general act. The situations described above are similar to that which would be created should the Senate ratify a general arbitration treaty which left the conclusion of the *compromis* to the President.

The last paragraph of Article 4 provides that if an accord is not reached between the parties with regard to the *compromis* within three months, reckoned from the date of the installation of the court, the agreement shall be formulated by the court. A somewhat similar treaty provision was considered in a most illuminating manner by Ex-President Taft in his book, *The Presidency*. In discussing the proposed arbitration treaties with France and England he wrote:

> The turning point was whether the Senate had the power to agree that all questions of a certain description should be submitted to arbitration and to leave to the tribunal of arbitration the question of jurisdiction under it, that is, the issue whether a future controversy involved questions within the class. Learned senators contended that this would be an invalid delegation of the function of the Senate to a tribunal of arbitration. It would not be a delegation of the authority of the Senate any more than it would be a delegation of the authority of the President, because the Senate's function is no more sacred, and no more necessary to the making of a treaty, than is the function which the President performs. I confess I have never been able to appreciate the force of the negative argument by the Senate in regard to this matter. The question of the jurisdiction of a tribunal to hear a par-

[43] 24 Stat. at Large, 475. [44] 26 Stat. at Large, 612.

[45] 224 U. S. 601. See editorial comment on the case in this JOURNAL, Vol. 6, p. 716.

> ticular question and to decide whether the question comes within the class of questions over which the treaty gives them jurisdiction is a question of the construction of a treaty, and the construction of a treaty is one of the commonest issues between nations submitted to arbitration. The agreement to abide a judgment as to jurisdiction in future is no more a delegation of control over foreign affairs than is an agreement to abide a judgment of an existing controversy in respect to such relations. The narrow view that the Senate has taken in this matter is inconsistent with any arbitration at all, and it precludes all useful treaties of arbitration in advance of the occurrence of the quarrel to be arbitrated. . . . The position is utterly untenable as a question of constitutional law.

The treaties which Ex-President Taft was discussing [46] probably conferred broader jurisdictional powers on the tribunal than does the arbitration treaty signed at the recent conference. While the *compromis* defines the subject matter of the controversy, it does not determine what questions shall be submitted to arbitration.

Article VII of the General Arbitration Treaty provides that the award settles the dispute definitely and without appeal. This provision marks one of the principal dividing lines between conciliatory proceedings and judicial settlement.

Upon signing the General Arbitration Treaty, a number of American Republics attached reservations which related largely to questions of substantive law. Most of these reservations provide that local remedies of foreign claimants must be exhausted in the national courts before resort can be had to international arbitration. This type of reservation is one relating to substantive international law with which the treaty did not attempt to deal. Mr. Hughes said in this connection:

> We are not here to add to international law. We are not here to codify international law. We are not here to create, we have no power to create additional rights under international law. We have no power to impose upon any state additional duties under international law. We are simply providing means for pacific settlement. . . .
>
> So far as the reservations that have been proposed are concerned, it should of course be understood that we do not seek to discuss the reservations which any state desires to make either in signing or in ratifying this treaty. It is not within the competence of any state to discuss the reservations proposed by another sovereign state when it comes to the signing or ratification of a treaty. But perhaps I may be allowed to make the suggestion that under this treaty no state is deprived of any right that it has under international law, and no state, of course, is relieved of any obligation which it may have under international law. Therefore, a reservation, if made with the idea that it would change international law, would be ineffective. It would simply mean that with respect to the matter reserved or excepted from the treaty we decline to have recourse to pacific settlement by arbitration.
>
> I trust that we shall all agree so far as we can to have recourse to

[46] 62nd Cong., 1st Sess., Senate Doc. No. 91, Vol. 30, 6108. See for text of proposed treaty with Great Britain, Supplement to this JOURNAL, Vol. 5, p. 253.

> pacific settlement, and I take pleasure in saying on behalf of the United States that we accept this treaty without reservations.[47]

Certain nations, upon signing the arbitration treaty, reserved as to questions which have their origin in situations or acts antedating the treaty, while other nations made reservations as to those matters controlled by international agreements now in force.

A reservation was made by Bolivia, which provides, that, in a territorial controversy, the zone to which the said arbitration is to apply must be previously determined in the arbitral agreement.

A reservation made by Guatemala provides that questions relating to boundaries of a nation should not be submitted to arbitration except with the approval of the legislative assembly.

Paraguay excepted those questions which directly or indirectly affect the integrity of the national territory and are not merely questions of frontiers or boundaries.

A reservation made by El Salvador provides for the deletion in paragraph (a) of Article II of the words, "and are not controlled by international law." It also excepted questions which, according to the political constitution of El Salvador, must not be submitted to arbitration.

PROTOCOL OF PROGRESSIVE ARBITRATION [48]

It was provided by Section 4 of the Habana resolution:

> That the convention or conventions of conciliation and arbitration, which may be concluded should leave open a protocol for progressive arbitration which would permit of the development of this beneficent institution up to its maximum.

Such a protocol was not required for the conciliation convention, because of the broad scope of that instrument. A protocol was signed in connection with the arbitration treaty, which provides that any party to the treaty may at any time by an appropriate instrument abandon in whole or in part stipulated exceptions in the treaty or reservations attached by it thereto. The withdrawal of a reservation is thereby recognized to be within the competence of any of the parties to the treaty. This flexible provision renders it possible to broaden the scope of obligatory arbitration without the necessity of negotiating a new treaty. Of course, a nation withdrawing a reservation would have to do so pursuant to the formalities required by its constitution. In the case of the United States, the withdrawal of a reservation would have to be made by the President, with the advice and consent of the Senate. A number of the delegates felt that this protocol was of great importance, because it will permit the broadening of the treaty as international law becomes more clearly defined and international understanding and security develop.

[47] Provisional Minutes of the Conference, Arbitration Committee, Jan. 3, 1929, p. 17.

[48] Text of protocol will be found in Supplement to this JOURNAL, p. 88.

ACHIEVEMENTS OF THE CONFERENCE

In closing the conference the chairman, Mr. Kellogg, stated:

> May I also refer to the fortunate circumstance that this conference was in session when the differences arose between two of our sister republics. These difficulties made dramatically evident the fact that the peace of the Americas is a matter that lies close to the heart of all the nations of this hemisphere and is something for which all the governments, members of the Pan American Union, feel a real responsibility. We may well congratulate ourselves that through the efforts of this conference the questions involved have been led into channels which promise an early and satisfactory adjustment.
>
> This conference will go down in history as having accomplished the greatest step forward in conciliation and arbitration. You have adopted two multilateral treaties, the most advanced and complete ever adopted by the nations of the world. This demonstrates that the nations of the Pan American Union are determined to establish tribunals and machinery for the prevention of war by the pacific settlement of all disputes between them.
>
> The action of this conference will have a profound influence not only on the public opinion of the Western Hemisphere, but of all the world. It is by such treaties, declarations and accomplishments that the world sentiment against war will be marshalled.[49]

Mr. Recinos of Guatemala further characterized the work of the conference when he stated:

> The present tendency among the nations is to refer the settlement of their differences to impartial tribunals, which are able to consider the case according to principles agreed to by the parties or according to universal judicial understanding, away from the atmosphere of conflict and passion, in a place where they are surrounded with evidences of respect for their noble and serious office.
>
> This tendency is well exemplified by the convention of arbitration drafted by this conference to establish the bases of international justice in the Americas. This treaty, together with the one relating to conciliation, which establishes at the same time the means of clarifying the issues pending their impartial investigation, fully justify the interest with which the whole world, and especially the Republics of this hemisphere, have followed the proceedings of the conference. To the great honor and credit of the nations of the New World, an assembly of their representatives, convened in order to ensure and guarantee the maintenance of peace, has triumphantly met the test to which it was put by the conflict which arose between two American Republics. It can present to the world with pride this example of two nations rescued from the perils of war and reconciled by amicable means proposed by this conference.[50]

The International Conference of American States on Conciliation and Arbitration demonstrated the advantages of a meeting with an agendum

[49] Provisional Minutes of the Conference, Fourth Plenary Session, Jan. 5, 1929, p. 3.
[50] *Ibid.*, pp. 4–5.

limited to pacific settlement. It remains to be seen what action will be taken by the governments in ratifying the treaties. Provided that both instruments are adopted by all the American Republics, these two multilateral treaties will serve the purpose of 420 bilateral agreements.

THE INTERNATIONAL TELEGRAPH CONFERENCE OF BRUSSELS AND THE PROBLEM OF CODE LANGUAGE

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The first telegraph had been in operation only a short time when a code was made available to the users of the new instrument. From that time to the present, codes for use in electrical communications have appeared in ever-increasing number. Two principal objects have been sought and achieved by their use: secrecy and economy. To the business man, the second of these objects is paramount; and code-makers have constantly endeavored to express an increasing amount of information in a given number of letters.

For a while real words used with other than their dictionary meaning constituted the basis of code language. The dictionary code, however, has a number of disadvantages and has been largely supplanted by codes composed of artificial words. From an operating standpoint, familiar words are easier of rapid and accurate transmission than are unfamiliar combinations of letters. Administrations and companies operating electrical communication services found it highly advantageous, if not absolutely necessary, to impose limitations upon the types of words which would be accepted for transmission over lines operated by them. Major William F. Friedman in his interesting and authoritative *Report on the History of the Use of Codes and Code Language* [1] presents an excellent picture of the developments which led up to the Cortina Conference. It will suffice here to note that when the International Telegraph Conference met in Paris in 1925 the regulations governing the construction of code language permitted the use of real or artificial words not exceeding ten letters in length.[2] Such words, however, were subject to the limitation that they must be formed of syllables capable of being pronounced according to the current usage of one of the following languages: German, English, Spanish, French, Dutch, Italian, Portuguese or Latin.[3] The regulations also recognized cipher language, composed of letters or of figures with a secret meaning without respect to word formation.[4] The

[1] Report on the History of the Use of Codes and Code Language, the International Telegraph Regulations pertaining thereto, and the Bearing of This History on the Cortina Report, by Major William F. Friedman, Washington, Government Printing Office, 1928. Document No. 1 of the Brussels Conference, presented by the Belgian delegation, contains a brief summary of the action with reference to code language taken by the various telegraph conferences.

[2] International Telegraph Regulations, Article 8 (Article 9 of the Paris revision); Article 19 (21), § 4. [3] *Ibid.*, Art. 8, § 2. [4] *Ibid.*, Art. 9 (10).

charge for cipher language was based on a group of five letters or a group of five figures.[5] Words in plain language might contain fifteen letters and still obtain the unit charge.[6] Plain language words interspersed in a code language telegram and in a cipher telegram were charged for at the rate of ten letters and fifteen letters per word respectively.

Code compilers had seen the possibilities of the ten-letter maximum, and dictionary codes, specialized so-called "root and terminal" codes, and syllable codes had been largely replaced by five-letter codes in which two words could be combined and transmitted at the cost of one. At the beginning of the practice (which the Telegraph Union clearly had not foreseen in adopting the rule in question) the operating companies had feared substantial losses; but the resulting reduction in cost to the users had led to an increase in traffic and had brought an increased revenue to the companies.[7] The early five-letter codes had been relatively brief; and the combinations for the most part had been easily pronounceable and capable of rapid, accurate transmission. With an enlarged group of users, the demand for more comprehensive and at the same time more specialized codes grew, and code books became more voluminous.

The compilation of codes involves more than the random selection of letters or syllables and the assignment to them of particular meanings. The successful compiler must be familiar with telegraph practice; he must know wherein lie difficulty in transmission and danger of mutilation. It was found that a two-letter differential in the five-letter word was absolutely essential if accurate transmission and reception were to be had. The effect of this practical requirement upon the number of permissible combinations is shown in an illustration of Major Friedman's, in which a particular five-letter arrangement without a two-letter differential produces about 200,000 easily pronounceable groups and the same arrangement with the differential yields but 11,000 easily pronounceable groups.[8] Inevitably it resulted that the newer words were more difficult from an operating standpoint than were the old. The number of easily pronounceable combinations being exhausted, barbaric combinations were presented. Competition between operating companies broke down the strict application of the pronounceability rule (in itself hard to apply in view of the possibilities of eight languages, the lack of linguistic knowledge of clerks, and especially the lack of a precise definition of the term "pronounceability").[9] Such combinations as

[5] International Telegraph Regulations, Article 8 (Article 9 of the Paris revision); Article 19 (21), § 7.

[6] *Ibid.*, Art. 19 (21), § 3.

[7] Friedman, *op. cit.*, pp. 51, 52.

[8] Friedman, *op. cit.*, pp. 40–43.

[9] "Neither is the clerk in a position to determine whether the pronounceability rule is observed or not, because he does not know the languages from which the words for code language may have been drawn. On the other hand, senders manage with facial contortions to pronounce words which contain up to four or five consecutive consonants, whence arise discussions between senders and telegraph clerks with a noticeable loss of time." State-

NHAZBCLYOJ, IWCCAEWBML, YLGMFPAHVY, and BYMGVRASMB were accepted as conforming to the regulations.[10] Major Friedman points out that PHTHIPSYCH clearly conforms to the regulations, being composed of syllables of the English words phthisis and psychology.[11]

THE CORTINA CONFERENCE

In this situation, a number of administrations and operating companies at the Paris Conference strenuously opposed the existing rules and sought to limit code words to a maximum of five letters selected without regard to pronounceability or other restrictions. Unable to reach a decision, the Conference established a Committee of Study consisting of a delegate from each of the following states: Germany, Belgium, China, Estonia, France, Great Britain, Greece, Hungary, Netherland Indies, Italy, Japan, Switzerland, Czechoslovakia, Turkey, and the Union of Soviet Socialist Republics.[12] The Conference resolution stated

> 1. That the application of the present statutes governing code language is giving rise to grave difficulties for the administrations and for the public;
> 2. That it is advisable to apply a remedy to this state of affairs with as little delay as possible;
> 3. That the solution might perhaps consist in admitting as code language only words or groups consisting of five characters.

The committee was subjected to one very important limitation in that the resolution provided that it should seek new unit rates "computed in such a manner that their application should not have financial effects less favorable for customers than the rates which will result from the decisions of the Paris Conference."

The first meeting of the Committee of Study was held in Paris October 19, 1925, the members being drawn from delegations to the Telegraph Conference.[13] Mr. Giuseppe Gneme, delegate from Italy, was elected chairman of the committee. Two other meetings were held in Paris on October 26 and 28, at which the committee gave its approval to several documents requesting information for its use. Of these the most important was a questionnaire of fifteen questions designed to establish the facts regarding the actual

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ment of the Chairman, August 3, 1926, Documents of the Committee for the Study of Code Language, Part IV, p. 15, English translation, Washington, Government Printing Office, 1928. Citations hereafter are to the English translation and will be given as Cortina Documents.

[10] Taken from a long list of similar combinations which had been presented at the Amsterdam office in December, 1925, Cortina Documents, Part II, pp. 67–69. A similar list compiled by Belgian authorities appears *ibid.*, pp. 53–58. For a criticism of the pronounceability rule from the standpoint of its difficulty of application, see Friedman, pp. 43–50.

[11] *Op. cit.*, p. 54. He also mentions XYSNIGNUMN, ALLLLAAALA, and AWKMNEPNEU as other examples from the English language (p. 45).

[12] Cortina Documents, Part I, p. 1.

[13] *Ibid.*

working of the existing code regulations. Tests of five-letter words formed in several ways were provided.[14] At the same time the German and Chinese delegations filed observations for transmittal with the questionnaire. The German observations were in the nature of mathematical calculations which showed that for Germany, if the five-letter code word should be adopted, a rate amounting to 86% of the existing rate would be necessary to provide the same return in the European régime [15] as under the existing plan, while in the extra-European régime the rate should be 60% of the existing one.[16] The Chinese delegation opposed the five-letter unpronounceable word as tending to introduce further difficulties in the telegraph service, and advocated the requirement that code words be composed of consonants and vowels appearing alternately, words always to begin with consonants.[17] The length of words under this plan was to be fixed at eight letters.

The committee adjourned its sessions until the necessary information should be obtained. Replies to the questionnaire were sent to the International Bureau of the Telegraph Union at Berne, Switzerland, which assembled and printed them for the use of the committee.[18] With the information at hand, the committee reassembled at Cortina d'Ampezzo, Italy, which city gave its name to the now famous report. Both wire and wireless communication companies assisted the committee in its labors. The first session at Cortina was held on August 2, 1926; the report was signed August 26.

Information received in answer to the questionnaire showed consistent abuse of the code language regulations, and wide discontent with their terms. Counter clerks were said to have difficulty in applying the pronounceability rule, particularly in view of the fact that they were not masters of eight languages. Time was required to ascertain that words did not contain more than ten letters. Acceptance of improper words by some companies forced competitors to do likewise. Investigations made by the Italian administration showed that the time required for the acceptance of code telegrams was approximately twice that for plain-language telegrams. Difficulty in transmission and reception, varying in degree and kind with the type of apparatus used, was reported. Operators were said to be more fatigued by code than by plain-language words; mutilations were more frequent; opportunity for rectification by the receiving clerk was lacking; more service

[14] Cortina Documents, Part I, p. 15.

[15] "The European system includes all the countries of Europe, with Algeria and those territories outside Europe which are declared by the respective Administrations to belong to the European system. The extra-European system includes all countries other than those indicated in the previous paragraph." Telegraph Regulations, Article 23, §§ 2 and 3.

[16] Cortina Documents, Part I, p. 10.

[17] *Ibid.*, p. 13.

[18] Data accumulated by the Berne Bureau prior to the reassembling of the Committee of Study is published as Part II of the Cortina Documents. Proposals submitted in the course of the committee's sessions at Cortina constitute Part III of the Documents. At the second plenary session at Cortina, August 3, 1926, the chairman summarized the information obtained by the questionnaire. Cortina Documents, Part IV, pp. 15–27.

telegrams correcting errors were necessary, thus increasing the expense and diminishing the length of time the wire was open for paid messages.

Statistics covering the time per effective letter for the transmission of ten-letter words under the existing regulations and five-letter words under the test conditions were inconclusive.[19] Transmission errors, however, were found to decrease when the ten-letter words were divided into two groups of five letters each. More service telegrams were required for code-language telegrams than for plain-language telegrams, but no conclusion could be drawn on this point with respect to five- and ten-letter code words.

In compliance with the questionnaire, code-makers, chambers of commerce, manufacturers and other business interests had been consulted on the adoption of the five-letter proposal. Almost unanimously they favored the maintenance of the *status quo*. The loss of the large amount invested in existing codes and the fear that the reduction in the number of admitted letters from ten to five would result in an immediate or eventual increase in telegraph costs were the expressed grounds of opposition.

Replies to the questionnaire revealed that the majority of telegrams in the European régime were in plain language, while the reverse was true in the extra-European régime. The average number of letters per plain-language word was found to be six and one-half.

THE CORTINA REPORT

Most of the delegations at Cortina favored the five-letter word system, though they differed as to its incidents. After extensive debates the task of finding a solution on which most of the delegates could unite was assigned to a subcommittee composed of delegates from Germany, Belgium, France, Greece, Italy, the Union of Soviet Socialist Republics, a representative of the cable companies and a representative of the wireless companies.[20] The subcommittee report as accepted by fourteen of the fifteen delegations (all except Great Britain) provided that code words should be composed of a maximum of five letters, selected at the sender's will, without any condition.[21] The unit rate was to be applied to each word, with the address and signature to be considered as plain language and charged for accordingly (one word up to fifteen letters). The report provided alternatives with reference to the unit rate:

First system	Uniform rate for the two languages	European régime	Present rate maintained
		Extra-European régime	*x*: coefficient to be applied to the present rate.

[19] The conclusions of the committee on the subjects covered by the questionnaire are printed in its report, published as one of the Cortina Documents.

[20] Cortina Documents, Part IV, p. 138.

[21] *Ibid.*, Report, p. 12.

Second system	In the two régimes	Plain language	Present rate maintained
		Code language	*y:* coefficient to be applied to the present rate.

The committee proposed to use as a basis for determining the value of the coefficients x and y the average ratios of the total number of words counted according to the existing system to the total number counted according to the two systems advocated by it. As the committee did not have at its disposal the information necessary to determine exactly the value of x and y on the basis indicated, it decided to proceed with an inquiry and communicate the information obtained to the administrations prior to the conference which should pass upon the committee's Report.[22] Provision was made for a transitory period of two years during which senders might use groups containing up to ten letters, to be counted as one word for the first five letters and one word for the excess.[23]

The British delegation, admitting that difficulties exist under the present rules, was unable to accept the majority position. It submitted a proposal which may be summed up as follows:

Transitory regulations applicable from January 1, 1928, to December 31, 1931: (a) To maintain the limit of ten letters per word. (b) To maintain the rule concerning pronounceability. (c) To add the following new rules: (1) a code word must contain at least one vowel in the first five letters and at least one vowel in the following letters; (2) not more than five successive consonants or vowels may appear in the same word.

Permanent regulations applicable from January 1, 1932: (a) To maintain the limit of ten letters per word. (b) To abandon the rule concerning pronounceability. (c) To add the following rules: (1) a code word must include at least two vowels in the first five letters and at least two vowels in the second group of letters (as an exception words of six, seven, or eight

[22] At the Brussels Conference the results of this inquiry were presented. They showed that the coefficient x for the European régime should be 88.5%; for the extra-European régime, 66%. The coefficient y for the European régime should be 64.9%; for the extra-European régime, 60%. Through an oversight, these figures were never incorporated in the *procès verbaux;* they are to be found in the report of the American delegation.

The information obtained by the United States pursuant to a similar inquiry was published under the title Delegation of the United States of America to the International Telegraph Conference of Brussels, Tabulations of Data Furnished by American Users of the International Communication Facilities in Response to a Questionnaire Based on the Cortina Majority Report, Washington, Government Printing Office, 1928. The tabulations showed that for the firms consulted, a coefficient of 57% applied to Cortina plan No. 1 (coefficient x) would result in an average decrease in cost of 1.69%, while a coefficient of 58% would result in an average increase in cost of .04%. It was pointed out that for individual customers the results would vary widely; thus a coefficient of 60% would result in a decrease in cost of 14.15% to one firm and an increase of 15.48% to another. About 500 firms replied to the questionnaire, and their answers show the importance which they attached to the subject.

[23] For a justification of the majority position see the Report, Annex III, pp. 27–34.

letters may contain two vowels in the first five letters and one vowel in the following letters); (2) not more than four successive consonants or vowels may be used in a single word.[24]

The records of the Cortina sessions and the Brussels Conference throw light on one cause of the differences between the majority and the minority. Government ownership and operations of telegraph facilities is the rule in the countries composing the majority. Their delegations were studying the problem primarily from the standpoint of operating agencies. Code words almost invariably are composed of ten letters, while the plain-language words average only six and one-half letters. Greater speed of acceptance, transmission and reception, both positively and relatively, mark the plain-language telegram. Yet the unit rate for code language and plain language is identical. Even within the limitation fixed by the Paris Conference to prevent higher charges resulting to the users of the services, the changes advocated would result in better and more rapid service at a reduced operating cost.

The British position had an entirely different emphasis. Code users are chiefly firms engaged in extensive business enterprises. The more information a firm can convey in a telegram, the more it will resort to the telegraph. More extensive use of the telegraph may mean quicker service on the world markets and an expansion of trade. At a time when British merchants are facing keen competition they should be encouraged, not discouraged, in the use of electrical communications. A reconstruction of code-language regulations requiring the abandonment of codes in which large sums have been invested, and possibly resulting in increased telegraph costs, would result at the very least in a period of uncertainty regarding electrical communications which would be detrimental to export trade.

THE WASHINGTON RADIOTELEGRAPH CONFERENCE

The resolution under which the Cortina Committee labored provided that "The final report of the committee and its conclusions will be submitted for the consideration and decision of the first telegraph or radiotelegraph conference which shall follow the end of the labors of the committee."[25] The Government of the Netherlands questioned the validity of any change which a radiotelegraph conference might make in the international telegraph regulations.[26] Acting under the above-quoted authority, however, the committee prepared its report for submission to the International Radiotelegraph Conference called to meet in Washington in 1927, as the Twelfth International Telegraph Conference, to be held in Brussels, was not scheduled to meet until 1930.

[24] For a statement of the British objections to the majority position and a defense of the British proposal, see the Report, Annex II, pp. 22–26.

[25] Cortina Documents, Part I, p. 2.

[26] *Ibid.*, Part II, p. 21, and Part IV, p. 15.

As *gérant* of the Telegraph Union the French Government requested the United States (not a member of the Union) to invite the members of the Union to send to the radiotelegraph conference delegates empowered to act upon the Cortina Report.[27] The desired invitations were issued. When the Cortina Report was presented to the radiotelegraph conference, that body decided that it could not properly act upon the report. The interested governments immediately proceeded to the organization of a telegraph conference, a conference that died in its infancy when it was pointed out that it had not assembled pursuant to the Telegraph Convention and so had no legal existence. It may be noted that the British delegation was the one which took upon itself the task of calling attention to the irregularity of the proposed organization of an international telegraph conference at Washington.

THE BRUSSELS TELEGRAPH CONFERENCE

Not desiring to wait until 1930 for action on the Cortina Report, delegations interested in it went on record as favoring the assembling of the Telegraph Conference at Brussels in 1928 for the sole purpose of considering the Cortina Report. The Belgian Government gave its consent to the earlier date; and in compliance with requests properly formulated under the Telegraph Convention and Regulations, issued invitations to the Twelfth International Telegraph Conference to be opened at Brussels on September 10, 1928.

Fifty-two administrations adhering to the International Telegraph Convention and Regulations had delegates at the opening session of the Conference. Though not members of the Telegraph Union, Canada, the Dominican Republic, Salvador, the United States of America, and Liberia were also represented. Eighteen communication companies or groups of companies had representatives present; and the International Chamber of Commerce, for the first time in history, was invited to participate and sent a delegation to protect the interests of the users.

In accordance with the usual procedure, the Conference elected the head of the Belgian delegation, Mr. L. N. J. Dethioux, as its president.[28]

Between the opening session and the second plenary session, the Swedish delegation presented a proposal which obtained a considerable amount of support.[29] The proposal was prompted by a desire to retain a rule for the construction of code words. It was pointed out that while the Cortina Report in theory permitted the retention of existing codes, in fact all codes of

[27] For a brief account of the fate of the Cortina Report at the Washington Conference see an article in this JOURNAL, Vol. 22, p. 28, at p. 38, entitled The International Radiotelegraph Conference of Washington.

[28] *Conférence télégraphique internationale de Bruxelles, 1928, Document No. 4.* Subsequent citations will be to Brussels Documents followed by the number of the document.

[29] Brussels Document No. 5. A similar proposal had been made by Sweden prior to the Cortina sessions; see Cortina Documents, Part II, pp. 22–25.

other than five letters would be abandoned because of the increased rate; and existing five-letter codes would be revised to take advantage of the greater latitude in construction. As new codes had to be constructed in any case, they should be constructed on a scientific basis. The establishment of a five-letter limit was purely accidental; the existing practice of code-makers had been followed, and that practice had developed because of the possibility of combining two five-letter words to form one ten-letter word. Taking issue with the advantages claimed for the five-letter word, the proposal presented the claims of a six-letter word based on fixed alternations of vowels and consonants to insure ease and accuracy of transmission.

At the second plenary session the president stated that two distinct problems were before the Conference: the formation of code words and the revision of the unit rate.[30] Though it recognized this distinction, the Conference found the two problems so intimately related that it was impossible to maintain a sustained debate on the first without the intrusion of the second.

During the same session the British delegation modified the position which it had maintained as the Cortina minority. The modification consisted in the withdrawal of clauses (c) and (d) of the transitory regulations and the whole of the permanent regulations.[31] The British position was thus reduced to the maintenance of the *status quo*.

At the suggestion of the German delegation, the president appointed a committee to meet with the delegation of the International Chamber of Commerce to assure a hearing on the wishes of the users. The committee was composed of members of the German, Belgian, Brazilian, Chinese, French, British, Italian, Japanese and Soviet delegations and of representatives of the Western Union, Eastern Telegraph, Transradio (Berlin) and Radio-France companies. The committee held two sessions on September 11 at which the administrations and companies explained to the representatives of the International Chamber the difficulties in the application of the existing rules governing code language and the advantages of the proposed modifications. The Chamber replied that it had no fault to find with the existing telegraph service, and that it could not give its consent to arbitrary changes which might increase the cost of telegraph to the users. The committee then stressed the endeavor of the Cortina Committee to avoid an increase in the cost of telegraph service, and requested the Chamber to express its views on the relative desirability of coefficients x and y. This the Chamber declined to do; and the committee on September 14 reported that the Conference might dispense with the assistance of the Chamber. Upon the adoption of the committee report, the representatives of the Chamber withdrew from the Conference.[32] In an interview shortly after their withdrawal, the Chamber's

[30] Brussels Do cument No. 10, Sept. 12.

[31] See supra, p. 297. Clause (d) related to the authority which should ascertain whether the pronounceability rule had been met.

[32] Brussels Document No. 21, Sept. 14.

representatives stated that their action was due to the lack of consideration by the Conference of the rights or interests of "cash customers."[33]

Various administrations and companies had expressed divergent views on the Cortina Report before and during the third plenary session. At that session the president appointed Mr. Boulanger, head of the French delegation, chairman of a committee to be selected by himself and entrusted with the task of analyzing the various proposals.

The committee's task was no easy one, for radically different opinions were held by the participating administrations. Opposition to the adoption of the Cortina Report had become apparent early in the session and had increased as the Conference continued. The Swedish proposal has already been mentioned, as has the action of the British Government in modifying its Cortina position. Prior to the presentation of the compromise text prepared by Mr. Boulanger's committee, a number of governments had gone on record as favoring the *status quo*. The United States, Canada, Nicaragua,[34] Ecuador,[35] and the Union of South Africa [36] so declared themselves. The Federation of British Industries [37] and the Eastern Telegraph Company [38] took the same position. In addition, Rumania [39] supported the Swedish proposal, Venezuela [40] expressed opposition to the Cortina Report, and Radio-Austria [41] expressed preference for the ten-letter word with some substitute for pronounceability.

After the presentation of the Boulanger text, Cuba,[42] Bolivia,[43] Colombia,[43] and Nicaragua [43] advocated the maintenance of the *status quo* and Spain [44] defended the ten-letter word with an enforceable pronounceability rule.

Before the report of Mr. Boulanger's committee was presented, a number of administrations and companies had expressed their views on the coëfficient to be applied to the five-letter word. The Cortina majority had presented alternative systems of tariffs.[45] The first system (x the rate coëfficient) provided a uniform rate for plain and code languages, while the second (y the rate coëfficient for code language) envisaged different rates for the two languages. Germany alone expressed preference for the second system; that government advocated the establishment of y at 63% of the present rate for the European régime and 60% for the extra-European.[46] Italy, Greece, Japan, the Soviet Republics and the Great Northern Telegraph Company supported the first system. Italy proposed that x be fixed at 90% for the

[33] New York Times, Sept. 15, 1928.

[34] For the position of the United States, Canada and Nicaragua, see Brussels Document No. 21.

[35] Brussels Document No. 31, Sept. 17.

[36] *Ibid.*, No. 34, Sept. 17.

[37] *Ibid.*, No. 23, Sept. 15.

[38] *Ibid.*, No. 26, Sept. 15.

[39] *Ibid.*, No. 16, Sept. 14.

[40] *Ibid.*, No. 21, Sept. 14.

[41] *Ibid.*, No. 36, Sept. 18.

[42] *Ibid.*, No. 40, Sept. 18.

[43] *Ibid.*, No. 52, Sept. 20.

[44] *Ibid.*, No. 40, Sept. 18.

[45] See p. 296, *supra*.

[46] Brussels Document No. 11, Sept. 12; No. 34, Sept. 17.

European régime and 66⅔% for the extra-European régime.[47] Greece favored 60%–70% without distinguishing between the régimes;[48] Japan advocated 75% for the extra-European régime;[49] the Soviet Republics urged 100% for the European régime and 75% for the extra-European;[50] and the Great Northern maintained that 73% was the correct figure.[51]

Other expressions of favor for the five-letter word showed like discrepancies. The American communication companies desired a coëfficient of 65%,[52] the Indo-European Cable Company 60% to 65%,[53] and Transradio Internacional (Buenos Aires) 70% to 75% for five-letter words.[54] Latvia found 71.5% of the full rate to be the proper charge for the five-letter word, the basis for the rate to be the letter rather than the word.[55] The Netherlands contended that 60% was proper for the extra-European régime and would be acceptable for the European, though 65% might be admitted as a maximum in the latter régime.[56] China, on the contrary, was emphatic in the belief that 75% was necessary in the extra-European régime if losses were not to be incurred.[57]

THE COMPROMISE

The report of Mr. Boulanger's committee was distributed on September 18.[58] It was in the nature of a compromise, giving to those who desired the *status quo* the right to use ten-letter words, but with a mechanical arrangement of consonants and vowels instead of pronounceability, and to those who preferred the five-letter word the right to use it at a reduced rate. Telegrams in code language were divided into two classes: (A) Telegrams composed of words of not more than ten letters, in turn divided into two groups: (1) real words in any of the eight languages (German, English, Spanish, French, Dutch, Italian, Portuguese or Latin); (2) artificial words containing at least one vowel if formed of five letters or more, two vowels if formed of six, seven, or eight letters, and three vowels if formed of nine or ten letters. Vowels were stated to be a, e, i, o, u, and y. (B) Telegrams composed of words of five letters, without any restriction.

Words in class (A) were to be subjected to the full rate and those in (B) to a rate two-thirds of the full rate. For purposes of determining the tariff to be applied, telegrams might be considered as belonging only to one class,

[47] Brussels Document No. 10, Sept. 12; No. 34, Sept. 17.
[48] *Ibid.*, No. 20, Sept. 14.
[49] *Ibid.*, No. 21, Sept. 14.
[50] *Ibid.*, No. 33, Sept. 17.
[51] *Ibid.*, No. 19, Sept. 14. Compare these figures with those recommended by the Cortina Committee, footnote 22, *supra*.
[52] *Ibid.*, No. 12, Sept. 12. This figure was based on a study of 1,750,000 words; *ibid.*, No. 40.
[53] *Ibid.*, No. 27, Sept. 15; No. 34, Sept. 17.
[54] *Ibid.*, No. 34, Sept. 17. The proposal would give customers the option of using a ten-letter word at full rate.
[55] *Ibid.*, No. 24, Sept. 15.
[56] *Ibid.*, No. 37, Sept. 18.
[57] *Ibid.*, No. 40, Sept. 18.
[58] *Ibid.*, No. 38.

not as belonging partly to (A) and partly to (B). In both cases words in the address and signature were to be counted as fifteen letters (the plain language maximum under the regulations). Plain language in the body of code telegrams was to be charged for on the basis of ten letters constituting a word in class (A) and five letters in class (B). Code telegrams in class (B) were to be preceded by the designation = COD =. (This was later changed to = CDE =.) The committee added that it seemed desirable to establish a minimum charge for telegrams of class (B) equal to the charge for two words of text.

The compromise was immediately subjected to attacks on the principle involved and on the application of the rate coëfficient for five-letter words. The committee issued a revision of its report on the day on which it had been presented,[59] and a second revision the following day (September 19).[60] The latter differed from the original report in providing with respect to group (1) of class (A) that combinations of words contrary to the usage of the language were forbidden, and with respect to group (2) of the same class that at least one of the vowels must appear in the first five letters and at least one in the remainder of the word. It was further provided that for telegrams of class (B), the minimum charge was that for four words. The statement of the revised report showed that it had been accepted by the German, Belgian, Brazilian, French, British, Italian, Dutch, Swiss and Turkish delegations.

Norway had suggested that if agreement could not be reached on the Cortina Report, the Swedish proposal of a six-letter word with alternating vowels and consonants should be adopted.[61] In harmony with that suggestion the Norwegian delegation proposed to amend the committee report by inserting in place of the provision for a five-letter word one for a six-letter word with strict alternation of vowels and consonants, the word to begin with either vowel or consonant.[62] This proposal was approved in a statement signed by the delegations from Luxemburg, Sweden, Lithuania, Latvia, Denmark, Bulgaria, Spain, Iceland, Turkey and Finland.[63] Rumania was later added to the supporters of the Norwegian proposal.[64]

Several advocates of the Cortina Report were reluctant to accept the proposed compromise and endeavored unsuccessfully to obtain a vote on the adoption of that report.[65] If put to a vote, the report undoubtedly would have been adopted by a substantial majority in spite of the number of states which had gone on record as favoring the *status quo*. The traditions of the Telegraph Union, however, do not permit action by a majority when there is determined opposition by a minority. In this atmosphere the Boulanger text was the only one with a chance for adoption. Debate there was, but it

[59] Brussels Document No. 42.
[60] *Ibid.*, No. 45.
[61] *Ibid.*, No. 31, Sept. 17.
[62] *Ibid.*, No. 41, Sept. 18.
[63] *Ibid.*, No. 44, Sept. 19.
[64] *Ibid.*, No. 46, Sept. 19.
[65] *E.g.*, Japan, China, and Czechoslovakia at the sixth plenary session, Sept. 20; *ibid.*, No. 52.

was largely confined to the expression of preference for the Cortina Report coupled with an acceptance of the Boulanger text in principle.[66]

In the discussion of the text proper, debate centered around the coëfficient for five-letter words; but as the opponents of the coëfficient fixed by the committee were divided in opinion as to whether the committee determination was too high or too low, the committee decision was retained. The principle of the Boulanger text was adopted by a vote of 47 affirmative to 4 negative with 3 abstentions. The small size of the vote in the negative may be explained in part by the fact that a number of partisans of the *status quo* were not members of the Telegraph Union and in consequence were not entitled to vote. At the seventh plenary session, September 22, the text was modified in a few unimportant particulars and was finally adopted.[67]

The Boulanger text came in for severe criticism by the operating companies. The Great Northern Telegraph Company stated that under the new rule governing the formation of ten-letter words the companies would be forced to accept many words difficult of transmission not admitted under the existing rules; that if five-letter words must be accepted at a reduced rate, that rate should be 75% not 66⅔%; and that the indication = CDE = preceding five-letter code word telegrams should be a paid indication rather than one transmitted free of charge by the companies.[68] The German cable and radio companies and the French radio companies concurred in the complaint that the rate permitted was inadequate.[69] The Western Union Telegraph Company, All America Cables and The Commercial Cable Company stated that the compromise text would not eliminate the barbarous words to which objection had been made, would not facilitate the acceptance or transmission of telegrams, and would have as its only effect the reduction of the rate on cipher language. If system *x* of the Cortina Report were not accepted by the Conference, these American companies demanded the maintenance of the *status quo*. The Radio Corporation of America thought that the compromise would be difficult to apply in practice; it favored the German proposal (based on Cortina system *y*) and if this were not adopted preferred the *status quo*. The Eastern Telegraph and Associated Companies greatly desired the *status quo*, but if the compromise should be adopted they requested that the provision for the five-letter word be excluded from the European régime. To this position Marconi's Wireless Telegraph Company gave its hearty support. The Indo-European Telegraph Company preferred Cortina system *x*, would accept a mechanical substitute for pronounceability, and in default of either of the above would support the com-

[66] See the debates in the sixth plenary session; *ibid.*, No. 52.

[67] *Ibid.*, No. 60, Sept. 24. The coëfficient established by the committee was approved by a separate vote of 40 affirmative to 9 negative with 6 abstentions. The report of the American delegation to the Conference, together with an English translation of the protocol adopted, was released by the Department of State on October 18, 1928.

[68] *Ibid.*, No. 43, Sept. 19.

[69] *Ibid.*, No. 49 and No. 51, Sept. 20.

promise text if the tariff on five-letter words should be fixed at 75% and the indication = CDE = should be charged.[70]

Obviously there is room for differences in interpretation of the protocol. Is the customer to determine the class to which his telegram belongs, or is the counter clerk to make the decision? If a telegram contains one five-letter word without any vowels and the remainder of the telegram is clearly within class (A), is the telegram to be considered as belonging to class (A) or to class (B)? If a telegram in class (B) contains code words of more than five letters, will some of the words be charged at two-thirds rate and the remainder at the cipher rate, *i.e.*, full rate? Nothing is said with respect to class (B) about the grouping of plain-language words. May these be cut up into five-letter groups and sent at the two-thirds rate applying to messages in class (B)? The answers to these and other questions which inevitably will arise, will influence the action of code compilers and purchasers of codes. At the present time a feeling of uncertainty is manifest.

On its face the decision reached by the Brussels Conference is far from that which was sought as ideal. The existing system had been attacked at Paris and at Cortina as placing too great a burden on the telegraph personnel. Counter clerks are relieved to some extent: instead of indulging in facial gymnastics in attempting to pronounce *prima facie* unpronounceable words, they are to ascertain that words do not contain more than ten letters and that there is the proper distribution of vowels. Traffic will probably continue at the same pace as formerly. Operators will have difficulty with the new ten-letter words as with the old, for many barbaric combinations can fall within the new rule. Existing codes in some cases may have to be modified because of the high premium on words not having the proper distribution of vowels; combinations of two five-letter words as at present constructed at times will fail to produce the required vowel distribution.[71]

The reduced rate on five-letter words offers the greatest possibility for a solution along the lines laid down by the Cortina Committee. Codes containing many words combinations of which will not fulfill the new requirements will have to be redrafted. Competition between code compilers requires each to produce a code which will be attractive because of the economy afforded by its use. The removal of restrictions on the formation of five-letter combinations affords the code constructors an opportunity to employ a greater number of such combinations than is possible at the present time.[72]

[70] The companies stated their positions at the sixth plenary session, Sept. 20; *ibid.*, No. 52.

[71] The report of the American delegation contains on page 6 the following statement: "Telegraphic inquiries were instituted to determine by reference to actual code telegrams how seriously the requirement that ten-letter code words must contain at least three vowels would affect modern five-letter codes. The results of such inquiries by the British delegation, the Belgian delegation, and others showed that a relatively insignificant percentage of code words contained less than three vowels."

[72] It has been stated that the new regulations governing the construction of five-letter

Codes will be drafted with the two parts of the compromise in mind. If five-letter words capable of combination into ten-letter words within the restrictions of the new regulations and charged on the basis of 100% prove relatively more economical, the efforts of the advocates of the five-letter word may have been in vain. But should it develop that codes compiled for the second part of the compromise furnish new five-letter words in sufficient number to eliminate the desirability of ten-letter combinations, and in sufficient variety to diminish the danger of mutilation and consequent error, the reduced rate of 66⅔% should prove an attraction sufficient to establish the widespread use of such codes. In such a case, the first part of the compromise would prove of little practical importance; and economic interest would accomplish what the majority at the Brussels Conference did not dare to impose.

The new regulations are to become effective October 1, 1929, if properly ratified by that time.[73] The next Telegraph Conference is to convene in 1932 at Madrid. That the question of code language will be considered again at Madrid is inevitable. The results of the work of that conference will depend in large part upon the activity of the code compilers in the interim.

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groups will permit the compilers to put into five letters the meaning at present conveyed by two five-letter words in combination. This has been denied by a leading code expert who anticipates that codes will become more extensive but believes that the increase in "condensing power" will probably be not more than 33% to 50%.

[73] To become effective, the protocol will have to be ratified by all of the parties to the Telegraph Convention. At the present time it appears possible that the necessary unanimity may not be obtained.

THE CHICAGO DRAINAGE CANAL AND ST. LAWRENCE DEVELOPMENT

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In 1900, by the opening of the Chicago drainage canal, there was provided a watercourse for the disposal of sewage and for navigation from Lake Michigan by way of the Chicago River to the Illinois and Mississippi Rivers. Entailing as it did the reversal of the flow of the Chicago River, this, from the engineering standpoint, has been hailed as a great achievement. The large abstraction of water from Lake Michigan through the canal, however, had its effect in a lowering of levels in the Great Lakes and the St. Lawrence River with consequent injury to navigation. This brought about constant opposition to the canal from the Federal Government and from Canada. Thus the Sanitary District of Chicago has been involved in a host of legal difficulties and put to much expense in adjusting its plant to the demands of the United States Government. The diversion in the meantime has been a constant source of ill-feeling towards the United States on the part of Canada and at present, although under federal control, offers an obstacle to the further development of Great Lakes and St. Lawrence waterways.

In its modern aspect, the history of this drainage canal dates from the passage by the Legislature of Illinois on May 29, 1889, of a general law for the creation of sanitary districts.[1] Section 23 of this enactment contemplated the building of a drainage canal from Lake Michigan to the Des Plaines or Illinois River and laid down specifications as to its depth and capacity. Under this authority, the Sanitary District of Chicago was created in 1889, the main canal completed between 1892 and 1900, and in the latter year the diversion of water from Lake Michigan begun.

Quite naturally, the projected diversion of lake water through the Chicago canal aroused the attention of the United States War Department, as charged with the protection of the navigability of the waters of the nation. As early as 1895 Col. O. M. Poe, of the Board of Engineers, reported that a diversion of 10,000 c.f.s. (cubic feet per second) at Chicago would mean a lowering of lake levels by some seven inches and would thus involve the rights of the Federal Government.[2] In its earlier years, however, the activities of the Sanitary District were carried on under the authority of the War Department. In 1896, in answer to a request from the president of the District, the

[1] Laws of the State of Illinois, 36th Assembly, 1889, p. 125.

[2] Col. Poe's report is in Appendix A (p. 49 *ff.*) to the Report on the Effects of the Chicago Drainage Canal on the Levels of the Great Lakes, by J. L. P. O'Hanly. Ottawa, 1896. For Col. Poe's conclusions, see p. 52.

"general plan" of the works was conditionally approved by the Secretary of War for a period of two years.[3] After the passage of the American federal law of 1899, in which provision is made for the protection of the navigable capacity of American waterways,[4] a permit was sought and obtained by the District, this definitely assuming that the flow in the canal was to be of 300,000 cubic feet per minute. Among the conditions of approval now laid down was the provision:

> That if, at any time, it become apparent that the current created by such drainage works in the south and main branches of Chicago river be unreasonably obstructive to navigation or injurious to property, the Secretary of War reserves the right to close said discharge through said channel or to modify it to such extent as may be demanded by navigation and property interests along said Chicago river and its south branch.[5]

This matter of the possible damage to navigation caused by currents was the chief interest of the War Department in the early years of the diversion. On this account, during the period, 1901–1903, several new permits, changing the authorized amount of diversion, were issued. The last of these, dated January 17, 1903, declared that after March 31, 1903, the diversion was to be fixed at a maximum of 250,000 cubic feet per minute (4,167 c.f.s.).[6] One further permit was issued by the War Department. The District had been constructing the so-called Calumet-Sag canal, through which water was to be brought from the Calumet River to meet the old drainage canal some three miles above Lemont. Approval for this project was given in 1910, but only upon the condition that no more water be withdrawn from Lake Michigan through the old and new routes combined than was already authorized to be withdrawn through the Chicago River canal alone.[7]

Restrictions placed by the United States War Department upon the amount of water to be diverted through the drainage canal were not honored. When the International Waterways Commission between the United States and Canada submitted its report on the Chicago diversion on January 4, 1907,[8] it was therein estimated that the actual diversion was about 5,000 c.f.s. instead of the authorized 4,167 c.f.s. By 1912 this amount had risen to some 7,000 c.f.s.[9] In 1917 the diversion through the Chicago Sanitary

[3] The various permits issued by the United States War Department to the District are printed in Appendix D, p. 223 *ff.*, to Papers Relating to the application of the Sanitary District of Chicago. Issued by the Dept. of Marine and Fisheries, Canada. Ottawa, 1912.

[4] 30 U. S. Stat. at Large, 1151 (Sec. 9, 10).

[5] Permit of May 8, 1899. Papers relating to the application of the Sanitary District, pp. 223–224.

[6] Permits of April 9, 1901, July 23, 1901, Dec. 5, 1901, and Jan. 17, 1903. *Ibid.*, pp. 225–229.

[7] *Ibid.*, Appendix K, pp. 261–262.

[8] Compiled Reports of the International Waterways Commission, 1905–1913. Sessional Papers, Canada, No. 19a, 1913, 2 vols., Ottawa. Vol. I, pp. 521–523.

[9] Memorandum by Gen. W. H. Bixby, Chief of Engineers, U. S. A. Appendix I to Papers relating to the application of the Sanitary District, p. 246.

Canal averaged about 8,800 c.f.s. with daily averages running up as high as 10,000 c.f.s.[10]

Such a disregard of the authority of the Federal Government brought about injunction proceedings against the District, commencing in 1908. For many years no decision was given, but, finally, on June 18, 1923, a decree of the Federal District Court of Illinois enjoined the diversion of more than the authorized 4,167 c.f.s. of water. Appeal was taken to the Supreme Court but this was denied.[11] It may be noted that the court in its opinion rested the decision entirely upon municipal law—the diversion lowered the levels of the Great Lakes and thus injured navigation, such injury could not be legally done without the consent of the United States, and that consent had not been given. The international question with Canada involved in the diversion and the British-American boundary waters treaty of 1909 was brought in only very incidentally as an indication of the interest of the Federal Government in the diversion.[12]

The decree was to go into effect within sixty days, but was "without prejudice to any permit that may be issued by the Secretary of War according to law." At that time the Sanitary District was diverting far in excess of the 4,167 c.f.s. to which it was cut down by the court's decision, and it was rather obvious that some temporary measures would have to be adopted for the gradual reduction of the actual diversion to the legal maximum in order to give time for the adoption of other methods of sewage disposal. Accordingly, hearings were again held before the Secretary of War on February 20, 1925, and a temporary permit was issued on March 3, allowing an average annual diversion of 8,500 c.f.s.[13] This was issued under, among others, the following conditions:

> 1. That this permit, if not previously revoked or specifically extended, shall cease and be null and void on December 31, 1929;
> 2. That the Sanitary District of Chicago shall carry out a program of sewage treatment by artificial processes which will provide the equivalent of the complete (100%) treatment of the sewage of a human population of at least 1,200,000 before the expiration of the permit;
> 3. That the Sanitary District shall pay its share of the cost of regulating or compensating works to restore the levels or compensate for the lowering of the Great Lakes system, if and when constructed.

It was evidently contemplated that, as the sewage treatment program provided for in the second condition progressed towards completion, the flow of water from Lake Michigan would be progressively cut down. By the time the permit expired in 1929 the diversion would thereby have been

[10] Diversion of Water from the Great Lakes and Niagara River. Reports by Col. J. G. Warren, Corps of Engineers, and Board of Engineers for Rivers and Harbors. Washington, Government Printing Office, 1921, p. 108.

[11] Sanitary District of Chicago *v.* United States, 266 U. S. 405 (1925).

[12] *Ibid.*, pp. 425–426.

[13] Copy of permit enclosed in note of Mar. 21, 1925, Mr. Kellogg to Sir Esme Howard, U. S. Dept. of State press release, Feb. 24, 1926, pp. 9–11.

reduced from its present gross flow at Lockport of 9,700 c.f.s. (this including the diversion by the City of Chicago of 1,200 c.f.s., not included in the limitation to 8,500 c.f.s. set in the permit itself) to 8,000 c.f.s., or probably to as low a figure as 6,700 c.f.s. By 1935, or before, as the program of sewage treatment advanced, the diversion would be reduced to the amount of 4,167 c.f.s. provided for in the permit of 1903.[14]

A recent decision in an inter-State suit has now unsettled this situation.[15] In this case the petitioner States successfully sought an injunction to restrain the diversion from Lake Michigan of any more water than was necessary for navigation purposes in the Chicago River and the drainage canal. In upholding the contention of the complainants, the Supreme Court based its action chiefly on its interpretation of the federal law of 1899 for the protection of the navigable waters of the United States.[16] This Act was construed to show the intent of Congress to prohibit unreasonable obstructions to commerce, while the powers of the Secretary of War under the Act were held to be limited to those necessary for the maintenance of the navigable capacity of such waters and not to permit him to restrict or destroy this capacity. Hence any permits given by the Secretary to the Sanitary District, in so far as they were issued in violation of this principle, were invalid. The court also held, although without devoting much argument to it, that a diversion of water in one State, which causes a lowering of water levels in other States and thereby does substantial injury to their interests, is illegal unless it be for the purpose of maintaining or improving navigation. In so far as the legal principles governing the relations of the States of the American Union may be applied internationally, this does much to sustain the argument of Canada, as this will be described in the following pages of this article, that the Chicago diversion was begun and is being carried on in violation of Canadian rights under international law. To prevent injury to the health of Chicago which would result from the abrupt restriction of the diversion, the court used its discretionary power as a court of equity and referred the matter to a special master to determine the amount of diversion necessary for the maintenance of navigation and the time which should be allowed the District to reduce its diversion to that limit.

In effect, this decision takes the control of the Chicago diversion from the Secretary of War and places it under the court. It has the further effect of doing away with the understanding of 1925, according to which the diversion

[14] Mr. Kellogg to Sir Esme Howard, Nov. 24, 1925, *Ibid.*, pp. 19–20.

[15] Wisconsin *et al. v.* Illinois *et al.*, 49 Sup. Ct. 163, Jan. 14, 1929. The original bill in this suit was filed by Wisconsin in 1922. Others of the Great Lakes States later joined as complainants, while many of the Mississippi River States, influenced by the prospects of a Great Lakes-Gulf of Mexico waterway, intervened for the defense. The final lineup showed the States of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York as complainants, with Illinois and the Sanitary District of Chicago, Missouri, Kentucky, Tennessee, Louisiana, Mississippi and Arkansas as the defendants.

[16] 30 U. S. Stat. at Large, 1151 (Sec. 10).

was eventually to be reduced to one of 4,167 c.f.s., as allowed in the permit of 1903. For this maximum is substituted that amount, yet to be determined, which is necessary for the maintenance of navigation in the Chicago River and the drainage canal. It does not, however, necessarily follow from this decision that it would be beyond the power of Congress to authorize a diversion equal to the present one. If Congress should adopt one of the proposals for a Great Lakes to the Gulf of Mexico waterway through the Chicago canal and should declare the present diversion of approximately 8,500 c.f.s. necessary for such a waterway, the Supreme Court might well find this congressional determination conclusive upon it.[17]

Neither in Canada nor in the United States do the first few years of the diversion seem to have occasioned much alarm in shipping circles, although probable losses in levels due to the diversion were noted by the engineers of the two governments. In 1896 a Canadian governmental engineer reported that a diversion of 12,500 c.f.s. would bring about a mean loss of 6.444 inches.[18] The report of the American army engineer, Colonel Poe, of the previous year has already been noted. Later reports of the United States engineers estimated the lowering due to a diversion of 10,000 c.f.s. at (estimate of 1900) .525 foot for Lakes Michigan and Huron and, later (estimate of 1904) at .521 for Lake Huron, this drop causing a further reduction in levels of .455 for Lake St. Clair and .379 foot for Lake Erie.[19] These figures are substantially in accord with later estimates. As has been mentioned, the War Department was, however, at first chiefly concerned, not with losses in lake levels, but rather with the protection of shipping in the Chicago River against the heavy current caused by the diversion.

Attention in both Canada and the United States soon began to be directed towards the question of levels. In 1905 was formed by the United States and Canada the International Waterways Commission with the purpose of considering the uses of the Great Lakes-St. Lawrence water system and the maintenance and regulation of suitable levels there. Before its initial meeting, each of the Canadian members of this Commission had had submitted to him four subjects which in the opinion of the Canadian Government demanded consideration. One of these was the effect upon the levels of Lakes Huron and Erie of the construction of the Chicago Drainage Canal.[20]

This subject was first taken up incidentally to the Commission's investigation of diversions from the Niagara River. In the report on this matter, issued on May 3, 1906, it was recommended that the amounts of water which might be diverted on either side of the boundary should be fixed at the then

[17] United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 65.

[18] J L. P. O'Hanly, Report on the Effect of the Chicago Drainage Canal on the Levels of the Great Lakes, Ottawa, 1896, p. 45.

[19] Reports of the War Department, Chief of Engineers, 1900, Part 8, p. 5401; 1904, Part 4, p. 4120.

[20] Compiled Reports of the International Waterways Commission, 1905–1913. Canada, Sessional Papers, No. 19a, 1913, 2 vols., Ottawa. Vol. I, p. 24.

actual diversions, that is, at 36,000 c.f.s. on the Canadian side and 18,500 c.f.s on the American side. In making these recommendations, however, the Commission stated that the diversions should be in addition to a diversion at Chicago of 10,000 c.f.s. for sanitary purposes.[21] There can hardly be in question the fact that this recommendation for the unequal division of permitted diversions on the Niagara River, seemingly so greatly disadvantageous to American interests, was made with the Chicago diversion in mind. In addition to the recommendation itself, there may be cited the report of the Canadian section of April 25, 1906, in which the apparent advantage of the Canadian interests in the allotment of water at Niagara is spoken of as being more than counterbalanced by the Chicago diversion,[22] and, further, the annual report of the Canadian Section of December 31, 1906, in which it was stated that the position at Niagara Falls had been dealt with "taking into consideration the large permanent diversion by way of the Chicago drainage canal."[23]

It would appear that, as far as the Chicago canal is concerned, the Commission in its Niagara Report had proceeded rather hastily and recommended the allowance of 10,000 c.f.s. to Chicago without full investigation. By the end of this same year the discovery was made that the plans of Chicago did not stop with the diversion of 10,000 c.f.s., but contemplated an indefinite increase as the population of the city grew. The Commission now referred somewhat regretfully, it would seem, to its early approval of the Chicago diversion: "It believed, in so doing, that it was accepting a general tacit agreement that some such amount was required to protect the health of Chicago, and that that city should have it without further question, whatever the effect upon navigation should be."[24] Now it appeared that Chicago would not be content with the stated amount and the Commission seemed to grow somewhat worried. In spite of this anxiety, however, it retained its original conviction that the protection of the health of Chicago was the prime object in this case. This may be evidenced by the remark of General Ernst, Chairman of the American Section, at the hearings on October 17, 1906, to the effect that the necessity of some diversion for the sanitary needs of Chicago was accepted.[25]

The report of the full Commission in regard to the drainage canal appeared under date of January 4, 1907. Emphasis was now laid upon the position of Lake Michigan as one of the sources of supply of the St. Lawrence system, for which freedom of navigation had been provided for by the British-American Treaty of 1871. The report then proceeded to summarize the effects in losses of levels caused by the present diversion, the resultant damages to navigation interests, and the costs of reconstruction of locks,

[21] Compiled Reports of the International Waterways Commission, 1905–1913. Canada, Sessional Papers, No. 19a, 1913, 2 vols., Ottawa. Vol. I, pp. 339–340.

[22] *Ibid.*, Vol. I, p. 338.

[23] *Ibid.*, Vol. I, p. 400.

[24] *Ibid.*, Vol. I, p. 424.

[25] *Ibid.*, Vol. II, p. 1182.

harbors, and channels in the Great Lakes-St. Lawrence system to compensate for the loss of levels.[26] On the basis of these facts, the International Waterways Commission held that the United States should prohibit the diversion of more than the 10,000 c.f.s. of the Niagara report. This amount ought to suffice, with proper treatment of the sewage, for the sanitary purposes of the city for all time. It would also suffice for the largest navigable waterway from Lake Michigan to the Mississippi which had been considered by Congress.[27]

Approval of the diversion of 10,000 c.f.s. of water through the Chicago canal may, at first sight, appear to be directly contrary to the Commission's recommendation in the matter of the Birch Lake diversion. In this latter case, which involved the projected diversion from waters in Minnesota, tributary to American-Canadian boundary waters in the Rainy Lake-Lake of the Woods system, the Commission had held that such a diversion would be contrary to Article II of the Webster-Ashburton Treaty of 1842,[28] which had declared these boundary waters "free and open to the use of the citizens and subjects of both parties." This clause, according to the Commission, secured to Canada, "by necessary construction, the right to navigate these waters in any manner which the natural flow will permit. Any interference with the natural flow which decreases the navigable capacity of Basswood Lake, Rainy River, Rainy Lake, or the Lake of the Woods is a violation of the letter and spirit of the treaty, and the extent of the interference is not important."[29] The Commission was also of the opinion that the common law of the natural flow of streams ought to be applied among states, since it was founded on justice and equity.[30] On such bases, therefore, it was recommended that the diversion be not allowed.

In this same report, however, the Commission had laid down principles which ought to be adopted by the two governments in dealing with the use of waters in which they had a common interest. According to these, uses of water for necessary domestic and sanitary purposes were given a favored position.[31] As has been indicated, in the Chicago matter the Commission was actuated by this belief that sanitary and domestic uses should be held paramount to navigation and was therefore willing that Chicago should have its 10,000 c.f.s. "whatever the effect upon navigation." It did not consider the question as to whether the Chicago diversion was really a "necessary" sanitary use, or whether such a method of sewage disposal was instead a wasteful and unnecessary one.

The formation and work of the International Waterways Commission proved to be but a preliminary step in the arrival at a solid basis for the

[26] Compiled Reports of the International Waterways Commission, 1905–1913. Canada, Sessional Papers, No. 19a, 1913, 2 vols., Ottawa. Vol. I, pp. 521–523.

[27] *Ibid.*, Vol. I, p. 529.

[28] 8 U. S. Stat. at Large, 572.

[29] Report of Nov. 15, 1906. Compiled Reports, Vol. I, p. 362.

[30] *Ibid.*, Vol. I, p. 365.

[31] *Ibid.*, Vol. I, p. 368.

treatment of the water problems of the American-Canadian boundary region. In its reports upon various situations submitted to it, the Commission had made recommendations as to what principles and clauses ought to be embodied in a treaty between the United States and Great Britain in regard to these problems. Such a treaty was signed on January 11, 1909,[32] and ratified by the two governments. The treaty followed rather consistently the recommendations of the Waterways Commission. A permanent commission, the International Joint Commission, is set up. Article III provides that no further uses or obstructions or diversions of boundary waters on either side of the United States-Canadian boundary line, if they affect the natural level or flow of boundary waters on the other side of the line, shall be made without the approval of this Commission. In one important matter, however, the recommendations of the Waterways Commission were disregarded. In the Birch Lake diversion report, as just described, the Commission had desired international control over the whole watersheds of boundary waters. This principle was not accepted by the negotiators of the treaty, and, with a few minor exceptions, the jurisdiction of the International Joint Commission therein established is confined to boundary waters.

Not only does the treaty of 1909 restrict in general the competence of the International Joint Commission to boundary waters, but it also made doubly certain that, except where specifically given, the Commission should have no power over other than such waters. Under Article II each party reserves to itself, subject to any treaty provisions now existing, "the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters." On the other hand, this general reservation is offset by a counter-reservation in this same article whereby each party reserves any right it may have to object to such interference or diversion in case it is such as to be of "material injury to the navigation interests on its own side of the boundary." The situation, in so far as the protection of navigation on boundary waters against diversions from upper portions or tributaries of such waters is concerned, therefore, is left in the same state as before the treaty was made. In the opinion of the American State Department at least, this Article II of the treaty recognized "that the settlement of the question of the use of the waters of Lake Michigan is purely a domestic question and leaves undisturbed the governmental rights of the United States in regard to it." [33]

[32] 36 U. S. Stat. at Large, 2448; Supplement to this JOURNAL, Vol. 4, p. 239.

[33] Memorandum prepared for the Foreign Relations Committee of the Senate by Mr. Chandler Anderson. Printed in Report of Hearings on the subject of the improvement of the Illinois and Mississippi Rivers and the diversion of water from Lake Michigan into the Illinois River. Com. of House of Rep. on Rivers and Harbors, 68th Cong., 1st Sess., pp. 1294–1298.

Consistently with its limitation of the new commission's functions to boundary waters, the treaty of 1909 made no mention of the Chicago diversion. The Waterways Commission had wished that the Chicago diversion be limited to 10,000 c.f.s. or, in other words, that in principle such a diversion should be considered as subject to international control, but this recommendation was disregarded. In regard to the Niagara River diversions, the Waterways Commission's recommendations had more success. The Commission had recommended that diversions from this river be limited to 36,000 c.f.s. on the Canadian side and to 18,500 c.f.s (exclusive of the Chicago diversion) on the American side. These figures were substantially (the American quota was rounded off to 20,000 c.f.s.) followed in the treaty, although, as just stated, there was no mention made of the Chicago diversion. This discrepancy here between the American and Canadian quotas is therefore left unexplained, except by the declared purpose of the pertinent Article V of the treaty to limit the diversion of waters from Lake Erie and to accomplish this "with the least possible injury to investments which have already been made in the construction of power plants."

Quite plausibly, this seeming injustice in the allotment of water from the Niagara River has been taken as an indication of the tacit agreement of the two governments that Chicago should have the 10,000 c.f.s. recommended by the Waterways Commission. The absence of mention of such a diversion, then, is explainable on the grounds that the United States was unwilling to accept any restriction upon the right of the United States to authorize diversions from Lake Michigan, since such an acceptance would have been in violation of the principle that Lake Michigan, a purely American lake, was not at all under international control. In support of such an argument, former Secretary of State Elihu Root, who negotiated the treaty of 1909, is quoted as declaring before the Senate Committee on Foreign Relations that the United States in the negotiations refused to permit anything in the treaty about the Chicago diversion or about Lake Michigan, and that on that basis he thought it best not to object to the 36,000 c.f.s. allowance on the Canadian side of the Niagara River, in spite of the smaller American quota.[34]

Although the attitude of Canada towards the Chicago diversion appears to have been passive in its earlier years, at least sufficiently passive to permit the International Waterways Commission, with its three Canadian members, to assume that there was a "tacit agreement" that Chicago should have its 10,000 c.f.s., yet as time went on opinion in Canada crystallized in opposition to the diversion to a position of absolute hostility to any permanent withdrawal whatsoever of water from Lake Michigan. Only some years after the negotiation of the treaty of 1909 does this attitude seem to have been officially expressed by representatives of the Canadian Government. The occasion for this expression occurred in regard to an application of the

[34] Quoted in Report of the Engineering Board of Review of the Sanitary District of Chicago, 1925, Part II, p. 71.

Chicago Sanitary District to the American Secretary of War for definite permission for the diversion of 10,000 c.f.s. from Lake Michigan. Hearings upon this were held on February 28, 1912, and again on March 27. Canada was invited to send representatives to these hearings and did so, the arguments of the Canadian representatives against the application being presented on the latter date.

These arguments may be divided into two parts. In the first place, from the legal standpoint, it was denied that such a diversion could be authorized by the United States without the consent of Canada. In the second place, from the practical standpoint, it was claimed that great losses were suffered by Canadian shipping interests as a result of the lowering of lake levels through this withdrawal of water and that these losses were not offset by any need, for sanitary or navigation purposes, for the diversion of so large a quantity of water.

In presenting the legal basis of opposition to the granting of the permit, the Canadian counsel, Mr. Daniel Mullin, laid most stress upon the treaty right to navigate Lake Michigan granted to Canada by the Boundary Waters Treaty of 1909. Here, he put forward the obviously somewhat extreme proposition that this treaty grant gave to Canada the right to navigate Lake Michigan "in any manner which the natural flow will permit." Any interference, therefore, with the natural flow "which decreases the navigable capacity of Lake Michigan or renders its navigation difficult in any way, is an infringement of the letter and spirit of the treaty." [35] In addition, it was maintained that the treaty right of Canada, under the treaties of 1842 and 1909, to navigate the boundary waters of the United States and Canada, had been impaired by the diversion. A newer note was struck at this hearing in the argument put forward on behalf of the Canadian Commission on Conservation to the effect that the diversion, since it diminished the levels of waters within Canada, was therefore contrary to general international law as altering natural conditions of the one state to the disadvantage of the natural conditions in a neighboring state.[36]

From the practical standpoint, the Canadian argument, following closely the method of treatment employed by the International Waterways Commission, went on to point out the losses in levels brought about by the diversion and the losses which the projected diversion of 10,000 c.f.s. would entail. Every inch of depth in the Great Lakes-St. Lawrence canals and harbors was now needed. To avoid grave financial loss to the grain-carrying fleet, in case the permit was granted, it would be necessary to make over these harbors and canals at a cost of $18,937,000 to neutralize the effects of the withdrawal of water.[37]

Such injury to the navigation interests of the United States and Canada

[35] Papers relating to the application of the Sanitary District of Chicago, p. 37.
[36] *Ibid.*, p. 82, citing L. Oppenheim, International Law, ed. 1905–1906, Bk. I, p. 175.
[37] *Ibid.*, pp. 24, 50, 52–54.

could be justified neither by the sanitary needs of Chicago nor by any advantages to be derived from a navigation canal between the Great Lakes and the Illinois and Mississippi Rivers. For the latter purpose a diversion of 1,000 c.f.s. would be ample.[38] Even if the use of the waters of the Lake for ordinary sanitary purposes were given precedence over navigation, such a principle would not cover the Chicago diversion, which was a use "unprecedented in its magnitude and unparalleled in its method." Other cities had found less wasteful methods of sewage disposal, and it would rather appear that it was only because this particular method permitted the incidental development of water power that it was the cheapest method for Chicago and that it had been adopted in preference to other equally efficient methods of sewage disposal.[39]

The Sanitary District met the issue as to the international legality of the diversion clearly. Canada had no rights whatsoever in Lake Michigan except that of navigation. No right of control over that lake had been given away by the United States in the treaty of 1909, and, since the lake lay entirely within its own boundaries, there was no reason why such a right should be given up. But, even assuming that the right of control of the United States over the lake was limited, then the fact that the use of the water withdrawn was for sanitary purposes was sufficient to give it precedence over the navigation interests defended by Canada.[40]

From the other standpoint, the District maintained that the effect of the diversion upon navigation had been greatly overestimated. The improvement of the channels in the connecting channels of the Great Lakes system had caused much of the loss of levels complained of and much more could be accounted for by natural fluctuations due to lack of rain.[41] This fact is further evidenced by the consideration that during the early years of the diversion the interest of the Federal Government had been manifested merely in the effect of the diversion upon currents in the Chicago River. Adverse effects of this nature had been corrected so that now there was no cause for complaint.[42] Again, any fall in levels due to the drainage canal could substantially be made up by compensatory works.[43] The need, moreover, of Chicago for the water was real, the percentage of dilution of the sewage provided for in the Sanitary District Act of Illinois of 1889 being, according to expert testimony, both proper and necessary.[44]

Basing his decision chiefly upon what have been denoted as the practical arguments *pro* and *con* of the desired diversion, Secretary of War Stimson denied the application of the Sanitary District, declaring that the question was one of such importance as not properly to be decided by an administra-

[38] Papers relating to the application of the Sanitary District of Chicago, p. 27, quoting from report, 1911, by Gen. Bixby, Chief of Engineers, U. S. A.

[39] *Ibid.*, pp. 18–20, 30, 63–66.

[40] *Ibid.*, pp. 170–172.

[41] *Ibid.*, pp. 155–156.

[42] *Ibid.*, pp. 142–143, 166–167.

[43] *Ibid.*, pp. 184–185.

[44] *Ibid.*, pp. 140, 144–146.

tive officer of the government. In any case, he considered it established that the diversion would "substantially interfere" with the navigability of the Great Lakes system, while no permanent necessity for the diversion in the interest of Chicago had been shown.[45]

Several months after the hearings on this application, but before the decision of the Secretary was rendered, the Canadian Government, through the British Ambassador at Washington, sent a somewhat belated protest to the United States State Department against the construction of the new Calumet-Sag channel, a permit for which had been granted by the War Department in 1910. The Ambassador had been requested to inform the United States Government that the Canadian Government viewed "with grave concern" the construction of that new channel and desired to register a protest against it "on the ground that it would be highly detrimental to the interests of the Dominion." [46] The forwarding of this protest by Ambassador Bryce to the State Department brought about the explanation that no further diversion was permitted under this grant of 1910, since it merely gave the District permission to divert the former amount of water through the two channels rather than entirely through the one.[47]

This reply did not satisfy the Canadian authorities and early in 1913 (in spite of the, to Canada, favorable decision of the Secretary of War) another communication was sent to the British Ambassador at Washington for transmission to the United States Government. A further memorandum was attached to this communication. Here it was pointed out that, although the permit issued to the Sanitary District by the War Department was for merely 4,167 c.f.s. it was of "public notoriety" that at least 8,000 and probably 9,000 c.f.s. were being diverted. The District, moreover, evidenced no disposition to conform to the terms of any permit and, in this connection, the memorandum made reference to the report of the president of the District for 1911 in which the latter stated that the presumption that the water supply for the canal was to be limited to 10,000 c.f.s. was "gratuitous and mischievous." The canal itself had a capacity of 14,000 c.f.s., which looked ominous to Canada.[48]

The memorandum, the contents of which have just been sketched, was transmitted by Ambassador Bryce to the American State Department together with a note in which he put forward the arguments as brought out in

[45] For text of Sec. Stimson's decision, see Sessional Paper No. 180, Canada, Vol. LX (1924), Part 7, 113 *ff*. A summary of his objections is given on pp. 119–120.

[46] The Gov. Gen. of Canada to Amb. Bryce, Nov. 23, 1912, transmitting report of the committee of the Privy Council, approved Nov. 19, 1912. Canada, Sessional Paper No. 180, Vol. LX (1924), Part 7, p. 110.

[47] Huntington Wilson (Acting Sec. of State) to Mr. Bryce, Dec. 24, 1912. *Ibid.*, pp. 111–112.

[48] Report of Privy Council, approved Feb. 21, 1913, and transmitted to British Ambassador at Washington under date of Feb. 25, 1913. *Ibid.*, pp. 120–124.

the report of the Privy Council sent to him.[49] Protest was registered against the construction of the silence of Canada in the early years of the diversion as being acquiescence. This was not permissible in view of the fact that no information concerning the canal and diversion had been sent to its government.

Mr. Bryce then developed the Canadian argument that the diversion was both a violation of Canadian treaty rights and a violation of the general principles of international law, independently of any treaty. In the first place, its illegality was based upon the ground that "any diversion of water from Lake Michigan which prejudicially affects the navigation of the Great Lakes infringes the rights secured to Canada by the Ashburton-Webster Treaty of 1842 in the channels of the River St. Lawrence and in the River Detroit and in the other passages and channels referred to in Article 7 of that treaty, as well as the rights of navigation in boundary waters and in Lake Michigan to which the Dominion is entitled under the Boundary Waters Treaty of 1909." In the second place, the protest was maintained "on the ground that apart from these treaties the authorities of the United States or the authorities of any state have not under the recognized principles of international law any right to divert from Lake Michigan by any means, or for any purpose, such an amount of water as will prejudicially affect the navigation of boundary waters in which both Canada and the United States are deeply and vitally interested." This note also stressed the fact that both nations had spent many millions of dollars for the improvement and development of these waters and hence their maintenance free "absolutely from injurious diversion on either side of the boundary line" was of "vital interest" to both the United States and Canada.

Again in 1921, upon rumors that the Chicago authorities were about to approach Congress for authority to divert more water, the British Ambassador addressed a protest to Secretary of State Hughes.[50] In this was repeated the argument of former Ambassador Bryce that the Chicago diversion violated both the treaty rights of Canada and international law. It was further suggested that the United States would agree that no solution of the Great Lakes-St. Lawrence waterway problem could be permanently satisfactory unless it were based "upon a recognition of the principle, established by international practice, that no permanent diversion should be permitted to another watershed from any watershed naturally tributary to waters forming the boundary between two countries."

As the time approached when it seemed likely that the United States Supreme Court would hand down a decision against the diversion, the Chicago Sanitary District made renewed efforts to gain Congressional authority for their acts. The first session of the 68th Congress, commencing in the winter of 1923, saw the introduction of no less than four bills, each having

[49] Mr. Bryce to Mr. Bryan, Mar. 17, 1913. *Ibid.*, pp. 125–126.
[50] Note of Apr. 22, 1921. *Ibid.*, pp. 128–129.

the result, under cover of the construction of a nine-foot channel from the Lakes to the Gulf of Mexico, of granting Chicago the right to divert its 10,000 c.f.s. of water on condition that it pay its fair share of the cost of constructing "compensating, and/or regulating works in the Saint Clair River and/or in the Niagara River and/or in the Saint Lawrence River at or above Rapide Plat" to make good the loss in levels caused by the lowering.[51]

A new protest from the British Embassy was delivered as the result of the introduction of these bills.[52] Here again the declaration was made that the Government of Canada was "unalterably opposed" to any diversion by Chicago. Specifically in regard to the proposed bills, it was pointed out that these all contemplated compensatory works for the Great Lakes system in return for the legal permission to divert 10,000 cubic feet of water per second, but none provided for compensation in the St. Lawrence.[53] Again on March 21, 1924, the Canadian Government, through the British Embassy, reënforced its previous statements of its stand in relation to the drainage canal.[54] Especially in view of the provisions of the bill before Congress, Canada hoped that no action would be taken "either to confirm or permit the claim of the Sanitary District of Chicago to continue the diversion of water." All of these bills failed of passage through Congress.

During the next year, the decision of the Supreme Court, declaring illegal the diversion of water at Chicago of over 4,167 c.f.s., brought about, as already described, the issuance by the War Department of a temporary permit for the withdrawal of 8,500 c.f.s. Notice of the hearings preparatory to the granting of this had been sent to Canada, and in return the British Ambassador expressed Canada's unwillingness to oppose any interim measures which might be adopted for the protection of the health of Chicago. It was desired, however, that the amount of water to be diverted under the new permit should be restricted "within the narrowest possible limit," and that no permit should be granted for the diversion of any water "not essential to safeguarding the health of the population of that city," and, further, that the period during which the withdrawal should continue would be made as short as circumstances permitted. At the same time Canada desired to reiterate its protest against the abstraction of water from the St.

[51] H. R. 5475. Printed on pages 1–5 of Hearings on the subject of the improvement of the Illinois and Mississippi Rivers and the diversion of water from Lake Michigan into the Illinois River. Com. on Rivers and Harbors, House of Rep., 68th Cong., 1st Sess. The other bills referred to contained quite similar provisions. They are printed in the same reports at pp. 222, 225, 226.

[52] British chargé to Sec. of State, Feb. 13, 1924. Canada, Sessional Paper No. 180, Vol. LX (1924), Part 7, pp. 141–143.

[53] The works on the St. Lawrence, "at or above" Rapide Plat, as provided for in these bills, would be for the purpose of regulating the level of Lake Ontario, and would have influence on relatively but a short distance along the St. Lawrence River.

[54] Sir Esme Howard to Mr. Hughes, Mar. 21, 1924. (From unpublished manuscript in Dept. of State.)

Lawrence basin and to have it made clear that Canada did not surrender any claims that might be put forward for consequential losses arising from the diversion.[55]

The permit itself, providing for no immediate reduction in the diversion and seeming to have as its only effect the making legal of what had just been declared illegal by the Supreme Court, was hailed with great disfavor by the Canadian Government. Some misunderstanding also arose as to the method of measuring the flow of water through the canal. The Canadian Government, therefore, felt itself "compelled to conclude that despite repeated protests no immediate or definite reduction" had been provided for. It now desired information as to whether it was not the intention of the American authorities to "take measures to ensure immediate as well as more definite and more substantial future curtailment in the amount of water which is being diverted." [56] In reply, Secretary Kellogg pointed out the conditions and understandings under which the permit was issued and the fact that by 1935 or before the diversion would be reduced to that authorized in 1903.[57]

Perhaps somewhat unwillingly, the Canadian Government was appeased by these explanations. In acknowledging Mr. Kellogg's note, however, the British Ambassador pointed out once more the serious loss to Canadian navigation and hydro-electric interests occasioned by the diversion and reiterated the contention that it was only the necessity of protecting the health of Chicago that could justify the withdrawal of the water and that the quantity should be strictly limited to that absolutely necessary for such a purpose. Once more the Ambassador stated his belief that a recognized principle of international practice forbade such a permanent diversion except with joint consent of the nations involved.[58]

Mention has already been made of the note from the British Ambassador to Secretary Hughes in 1921, in which it was pointed out that no satisfactory solution of the Great Lakes-St. Lawrence waterway problem could be reached until an understanding was arrived at concerning the diversion at Chicago. Such a position had been foreshadowed by previous Canadian

[55] Sir Esme Howard to Mr. Hughes, Feb. 24, 1925. U. S. Dept. of State press release, Feb. 24, 1926, pp. 5–6.

[56] Mr. Chilton, British chargé, to Mr. Kellogg, Sept. 15, 1925. *Ibid.*, pp. 16–17.

[57] Mr. Kellogg to Sir Esme Howard, Nov. 24, 1925. *Ibid.*, pp. 19–20.

[58] Sir Esme Howard to Mr. Kellogg, Feb. 5, 1926. United States Daily, April 20, 1928, p. 2. To this the Ambassador added the statement that the "decision of the United States Supreme Court of January 5, 1925 (Sanitary District of Chicago *v.* United States, 266 U. S. 405) recognizes that in the present instance, the Treaty of January 11, 1909, expressly provides against uses 'affecting the natural level or flow of boundary waters' without the authority of the United States or the Dominion of Canada within their respective jurisdictions, and the approval of the International Joint Commission agreed upon therein." If the Supreme Court had quoted fully the pertinent clause of the treaty, this would have read "against uses . . . of boundary waters on either side of the line, affecting. . . ." As thus qualified, this treaty clause has no bearing on Lake Michigan. In any case, the quoted extract from the court's opinion had been only thrown in incidentally to the main argument.

action. During the hearings in 1913 before the International Joint Commission established by the treaty of 1909 upon the question of remedial works in connection with the making by the United States of the Livingstone Channel in the Detroit River, Canada protested against these works on the basis that it was useless to provide for increases in the depths of channels when these increases only served to make up the loss of depth occasioned by the Chicago diversion, or when their advantages might be nullified by an increase in this diversion.[59] Again in 1917 this protest was referred to and the same argument put forward by Canada when plans for improvements in the St. Clair River were being considered. Canada here reaffirmed its objections to dealing with individual sections of the "international highway" of the Great Lakes and particularly so "while unauthorized diversion farther upstream is continued."[60]

During the last few years interest in the development of the St. Lawrence River for navigation and power has been intensified. In 1921, upon a reference by the Canadian and American Governments, the International Joint Commission submitted a report recommending such development.[61] Shortly thereafter the United States signified its readiness to negotiate a treaty for the development of the St. Lawrence on the basis of this report "with such modifications as might be agreed upon." The Canadian Government did not deem it expedient to deal with the matter without further study.[62]

In 1924 further steps were taken. It was then agreed that an enlarged joint engineering board should be set up between the two countries to examine the advisability of carrying out the scheme of improvement suggested by the report of the engineering officers to the International Joint Commission in 1921. The board was also to report as to the extent by which such development would affect the flow of the St. Lawrence at and below Montreal as well as the levels generally of the boundary lakes and rivers.[63] In its report of November 16, 1926, the board favored development along the lines suggested in 1921, but with some rather substantial changes.[64] An American

[59] The International Joint Commission, Report on the Livingstone Channel, Apr. 8, 1913. Washington, 1913.

[60] International Joint Commission, Application of the Government of the United States for approval of certain contemplated improvements in the St. Clair River at Port Huron, Mich., p. 31 (par. 8).

[61] Report of the International Joint Commission concerning the improvement of the St. Lawrence River between Montreal and Lake Ontario for navigation and power, dated Dec. 19, 1921. Sen. Doc. No. 114, 67th Cong., 2nd Sess.

[62] Mr. Hughes to Sir Auckland Geddes, May 17, 1922; Report of the Committee of the Privy Council of Canada, approved May 29, 1922. Canada, Sessional Paper No. 89a, 1922, pp. 4–6.

[63] Mr. Hughes to Sir Esme Howard, April 28, 1924; Sir Esme Howard to Mr. Hughes, May 8, 1924. Dept. of State press release, April 21, 1925, pp. 1a, 1b, 1c.

[64] St. Lawrence Waterway, Report of the Joint Board of Engineers appointed by the Governments of the United States and Canada. Washington, 1927, p. 40.

commission, established to consider the general question of the development of a shipway from the Great Lakes to the sea, considered this report and advised the development of the St. Lawrence route provided suitable arrangements could be made with Canada for its joint undertaking.[65] These conclusions were accepted by the United States and on April 13, 1927, Secretary Kellogg proposed to Canada the commencement of negotiations.[66] The Canadian Government, however, was for the time being unwilling to proceed.[67] Further study, however, convinced the Canadian Government of the advisability of undertaking the work. A note of January 31, 1928, therefore proposed certain modifications in the report and desired to know if this would provide an "acceptable basis of negotiation."[68] These proposed modifications, chiefly in regard to the sharing of the cost of the work, were not altogether acceptable to the United States, but nevertheless the general plan outlined in the Canadian note was declared suitable for negotiations.[69]

Along with this increased interest in St. Lawrence development has come the frequent reiteration of the Canadian position that this problem must be considered in conjunction with the entire problem of the Great Lakes-St. Lawrence watershed and thereby with the Chicago diversion. In 1925, in the correspondence growing out of the decision of the Supreme Court against the Sanitary District and the resulting issuance of a temporary permit to that District, the Canadian attitude was emphasized. On behalf of the Canadian Government, the British chargé pointed out that "works dependent on the levels and flow of the Great Lakes System cannot be confidently projected or economically carried out if diversions from the watershed are permitted without mutual assent thereto." Moreover, this "continued and increasing impairment of the natural levels and discharge of the Great Lakes System, due to the diversion from Lake Michigan" was declared to raise the question "as to the extent to which the Canadian Government would be warranted in giving consideration to any further improvement therein until there is an assurance of definite curtailment of such diversion."[70]

[65] St. Lawrence Waterway Project, Message from the President of the United States transmitting a report of the Chairman of the United States St. Lawrence Commission upon the development of shipway from the Great Lakes to the sea. Report dated Dec. 27, 1926. Sen. Doc. No. 183, 69th Cong., 2nd Sess. The conclusions arrived at by the Commission are given on p. 6 of this report.

[66] Mr. Kellogg to Vincent Massey (Min. of Canada), April 13, 1927. New York Times, July 16, 1927, p. 20.

[67] W. L. MacKenzie King, Prime Min. of Canada, to the Sec. of State of the U. S., July 12, 1927. New York Times, July 16, 1927, p. 20.

[68] Min. of Canada to Sec. of State of U. S., January 31, 1928. United States Daily, April 17, 1928, p. 2.

[69] Mr. Kellogg to Min. of Canada, Mar. 2, 1928. United States Daily, April 18, 1928, p. 2.

[70] Mr. H. G. Chilton to Mr. Kellogg, Sept. 15, 1925. U. S. Dept. of State press release, Feb. 24, 1926, pp. 16–17.

The same attitude had been manifest in the disagreement in the drawing up of the instructions to the Joint Engineering Board on the St. Lawrence Waterway. On June 28, 1924, Secretary Hughes had expressed the willingness of the United States to include "consideration of the diversions of water from Lake Michigan among the questions to be referred by the United States and Canada to the Joint Board of Engineers appointed for the further investigation of the proposed St. Lawrence Waterway," this to be "without prejudice to the rights of this Government with reference to the diversion of water from Lake Michigan or the position which it may take concerning questions that may arise because of such diversions."[71] The instructions for this joint board were drawn up by two technical officers and then submitted to the two governments. The initially projected instructions were approved by Secretary Hughes in general, but certain modifications in Question VI were suggested. By this question, the board was charged with reporting on the effect of diversions of 5,000 and 10,000 c.f.s. from Lake Michigan upon the quantity of water available for power in the St. Lawrence and upon the water levels of the Lakes and the St. Lawrence. On the other hand they would have to report in regard to diversions from Lake Erie (the main concern here was the diversion by the new Welland Canal in Canada) merely upon the effect of an increase in the discharge of 1,000 c.f.s. upon water levels. The United States desired that, if the effect of the Lake Michigan diversion were considered by the board, they should also report upon "not only the effect of further diversions from Lake Erie on water levels, but also the extent to which the unequal diversions from Lake Erie and the Niagara River for power compensate for loss of power attributable to diversions from Lake Michigan." A change in the instructions embodying this feature was therefore proposed.[72]

This proposal was not acceptable to Canada and, since the United States persisted, it was agreed to resubmit the matter to the technical officers.[73] A compromise was effected and Question VI, as redrawn, provided for a report upon the effects of all authorized diversions from the St. Lawrence watershed upon levels, upon the restoration of depths affected by such diversions, upon power otherwise capable of development in the St. Lawrence with the water now diverted, and upon the possibility of constructing works which would compensate for such loss. This last sub-question was to be answered "without considering compensation by the present relative diversions of water from the Niagara River and from Lake Erie, and without prejudice to a future consideration thereof." The instructions were

[71] Mr. Hughes to Sir Esme Howard, June 28, 1924. *Ibid.*, pp. 4–5.

[72] Mr. Hughes to Mr. Brooks (chargé *ad int.* at the British Embassy), July 2, 1924. U. S. Dept. of State press release, April 21, 1925, pp. 6–7.

[73] Sir Esme Howard to J. C. Grew (Acting Sec. of State), Aug. 18, 1924; Mr. Hughes to Sir Esme Howard, Sept. 10, 1924; Sir Esme Howard to Mr. Hughes, Oct. 20, 1924; Mr. Hughes to Sir Esme Howard, Nov. 10, 1924. *Ibid.*, pp. 7–11.

now approved by the two governments, each making a specific reservation in regard to its later attitude towards the questions in dispute.[74]

During the following year Canada again found occasion to put forward its plea for a discussion of "all outstanding waterway problems" with the United States, for which the approaching report of the Joint Engineering Board, the coming consideration of the Niagara situation and the assurances which had been given to Canada concerning the early reduction of the flow through the Chicago drainage canal were declared to provide a basis. At the same time, Canada desired to call attention to proposals in Congress for the development of the Great Lakes-Mississippi waterway by way of the drainage canal, which would have the effect of giving statutory confirmation to the then large diversion. This would seriously complicate the opportunity for any such discussion and settlement of the waterway problems. The common interest of the two countries in the projected St. Lawrence waterway, the principles of international practice and the provisions of the Boundary Waters Treaty of 1909 all aided in reënforcing the conclusion that such diversions of water from a "common watershed" should be forbidden.[75] In answering this note, Secretary Kellogg refused to admit the illegality of the withdrawal, but declared it unnecessary at the time to consider that question, since the United States was prepared to discuss the "outstanding questions affecting the Great Lakes and their waterways with a view to arriving at joint engineering solutions of those questions and the protection and development of great waterway resources for the mutual benefit of both countries."[76]

On November 16, 1926, appeared the report of the Joint Board of Engineers. This report seemed to alter, for the time at least, the willingness of the United States to submit the question of the Chicago diversion to international investigation. Although the report substantially jibed with previous engineering estimates as to the effects of the latter diversion, it also brought out other factors, which in part mitigated the blame attached to the drainage canal for the loss in levels of the Great Lakes. Among other causes were mentioned the new Canadian Welland Canal from Lake Erie, the regulation of Lake Superior under the auspices of a Canadian-American engineering board, and the period of low rainfall occuring during the past few years up to 1926, which, combined with the other factors had created "record low levels on Lakes Michigan, Huron and Erie." Further, the levels of the lakes might fully be restored by compensating works.[77] On this account, Secretary Kellogg desired to postpone the publication of the communications in

[74] Mr. Hughes to Sir Esme Howard, Dec. 29, 1924; Sir Esme Howard to Mr. Hughes, Feb. 4, 1925; Mr. Kellogg to Sir Esme Howard, Mar. 17, 1925. *Ibid.*, pp. 12–18.

[75] Mr. H. Chilton, British chargé, to Mr. Kellogg, undated note received May 1, 1926. United States Daily, April 21, 1928, p. 2.

[76] Mr. Kellogg to Sir Esme Howard, July 26, 1926. United States Daily, April 21, 1928.

[77] St. Lawrence Waterway, Report of the Joint Board of Engineers, pp. 10, 11, 42–44.

regard to this matter between the two governments during that year, which had been requested by the British chargé. The impressions had prevailed, he stated, that the fall of 30 inches in lake levels was due to the Chicago withdrawal. Now the report showed this to have played merely a minor part in the actual fall of levels and it would be inadvisable to publish correspondence which had been based at least on partial misapprehension of the facts. Further, the report showed that the losses in levels could be corrected by compensatory works and he desired therefore to enter upon a discussion of the "practical question of providing compensatory works as recommended by the Joint Board of Engineers."[78]

The request for publication was renewed next year in a note from the Canadian chargé to Mr. Kellogg.[79] Canada had been under no misapprehension as to the extent of loss of levels attributable to Chicago and hence the publication of the report of the Joint Board did not alter its standpoint. While recognizing the marked advantage of compensatory works as proposed by the American Secretary of State, Canada "would not be prepared to enter upon a discussion of any plans for the construction of such works, if this course involved an assumption that the present abstraction is to continue." Such compensation, moreover, would not restore the loss in hydro-electric development occasioned by that abstraction. Secretary Kellogg, in answer,[80] gave consent to the publication and reverted to the position taken by the government during the correspondence of 1926. The United States did not admit the illegality of the abstraction of water by Chicago, but was prepared to "enter into discussions and negotiations with Canada covering the whole question of preservation of lake levels in the mutual interests of the two countries." In regard to the inability of compensating works to recoup power losses occasioned by Chicago, the Secretary again called attention to the inequality in quotas at Niagara, to the 36,000 c.f.s. allowed to Canadian hydro-electric works and the 20,000 c.f.s. to which American users were restricted.

The present situation in regard to the Chicago drainage canal seems to remain as depicted in these last few notes. Canada denies the legality of the diversion and insists upon its discussion whenever the question of St. Lawrence development is taken up. As regards the legal question, the Canadian standpoint is based upon two assumptions: first, as is maintained by several international publicists of note, that no state may within its own borders take action that will injuriously affect the flow or levels of water without its boundaries; second, that the treaty right possessed by Canada to

[78] Mr. Kellogg to Sir Henry Chilton, Dec. 7, 1926. United States Daily, April 21, 1928, p. 2.

[79] Mr. Laurent Beaudry to Mr. Kellogg, Sept. 1, 1927. United States Daily, April 23, 1928, p. 2.

[80] Mr. Kellogg to Mr. Massey, Min. of Canada, Oct. 17, 1927. United States Daily, April 23, 1928, p. 2.

navigate the American-Canadian boundary waters and Lake Michigan is to be construed as a right to navigate those waters in any manner which the natural flow will permit. This was the attitude taken by the International Waterways Commission in the Birch Lake diversion question, to which reference has already several times been made. The United States in that case denied that a treaty right of navigation was subject to any such construction. In its opinion, the question of "what rights and obligations govern the proposed diversion of tributary waters in this case depends upon the principles of international law and not upon the provisions of this treaty."[81]

Nor do the principles of international law, according to what seems to be the official American attitude, impose any restrictions upon the right of a state to the full use and disposal of waters within its boundaries, even though they may be tributary to boundary waters. This had been the attitude taken by the American Government in its other important controversy of this nature, in which Mexico had protested against the diversion of the waters of the upper Rio Grande. This controversy was ended in 1906 by a convention[82] in which the United States agreed to deliver to Mexico a designated amount of water each year. However, the convention specifically declares the parties to it to be actuated by the "consideration of international comity," while the agreement to deliver the water shall not be construed as a recognition of "any claim on the part of Mexico to the said waters." On the other hand, from the practical standpoint, this agreement seems in many ways to be a recognition of the Mexican claims. Further, it may be noted that it was as a direct result of Mexican protests in this connection that the American Secretary of State had instigated the Secretary of War to take legal proceedings to prevent the construction, by a private concern, of the Elephant Butte irrigation dam on the Rio Grande, since its proposed erection had given rise to "an important and perplexing international question."[83]

As has been pointed out, the American-British treaty of 1909 would appear to fortify the American contention that diversions from purely national portions of international waters are strictly matters of local concern, since such uses are reserved from the jurisdiction of the International Joint Commission. Even if this principle of absolute control be valid, there may be practical reasons against its application in particular instances. To again refer to the Lake of the Woods watershed problem, in its report on this

[81] Memorandum attached to note of Elihu Root, Sec. of State, to James Bryce, Amb. of Great Britain, Jan. 13, 1908 (unpublished). The treaty provisions referred to here is Article II of the Webster-Ashburton Treaty of 1842, which provided that the water communications and usual portages between Lake Superior and the Lake of the Woods (to which Birch Lake and the other waters here in question are tributary) should be free and open to the citizens and subjects of both countries (8 U. S. Stat. at Large, 572).

[82] 34 U. S. Stat. at Large, 2953.

[83] Mr. Olney to the Sec. of War, Jan. 13, 1897. Sen. Doc. No. 229, 55th Cong., 2nd Sess., pp. 24–26.

matter the International Joint Commission pointed out that the development of that water system would have to be conditioned "upon some definite understanding that the flow of water on which it is based will not be diminished by a diversion of any portion thereof from the watershed." [84] This necessity was recognized by Canada and the United States, and in Article XI the Lake of the Woods treaty of 1925,[85] it is provided that:

> No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or the Dominion of Canada within their respective territories and with the approval of the International Joint Commission.

Permanent diversions from tributaries of this watershed are thus brought under the same régime as had been diversions from boundary waters themselves by the treaty of 1909.

The long-continued stand taken by Canada on the St. Lawrence development scheme, as well as the readiness of the United States to discuss all problems affecting the whole watershed, seem to indicate the possibility of some similar solution being arrived at whereby the Chicago diversion will be internationally limited. This, however, if acceptable at all to the United States, would presumably have to be accompanied by the equalization of the quotas at Niagara Falls, or at any rate by their consideration in determining the status of the Chicago drainage canal. This situation has not been changed by the published correspondence of the past year. In its acceptance of the report of the Joint Board of Engineers on the St. Lawrence Waterway as, in general, a suitable basis for negotiation, the Canadian Government again expressed the hope that in any such further consideration, "opportunity may be found for reaching a comprehensive settlement of all outstanding problems affecting the Great Lakes and the St. Lawrence, including the preservation of the watershed, of which the present discussion indicates the paramount importance." [86] The United States, in turn, in accepting the modified report as a basis of negotiation, again expressed its willingness to have the "discussion" extended to these outstanding problems.[87]

[84] International Joint Commission, Final Report on the Lake of the Woods Reference, dated June 12, 1917. Washington, 1917, pp. 70–71.

[85] Treaty of Feb. 24, 1925. 44 U. S. Stat. at Large, 2108; Supplement to this JOURNAL, Vol. 19, p. 128.

[86] Mr. Massey to Mr. Kellogg, Jan. 31, 1928. United States Daily, April 17, 1928, p. 2.

[87] Mr. Kellogg to Mr. Massey, Mar. 2, 1928. United States Daily, April 18, 1928, p. 2.

THE "INJUNCTION OF SECRECY" WITH RESPECT TO AMERICAN TREATIES

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The following incident will explain the reason for the suggestions in this paper that treaties signed on behalf of the United States should be published, in some cases, before their ratification.

In 1925, the Government of the United States was represented at an International Conference on the Protection of Industrial Property held at The Hague, and on November 6, 1925, the representatives of the United States signed the Convention for the Protection of Industrial Property. This new convention effects a revision of the convention signed at Washington on June 2, 1911, to which the United States is a party.[1] On February 5, 1927, the President of the United States transmitted the text of the convention of November 6, 1925, to the Senate, with a request for its advice and consent to ratification. The Senate has not yet given its advice and consent, and therefore the convention has not been ratified by the President of the United States. On May 1, 1928, the ratifications of seven of the signatories were deposited at the Ministry of Foreign Affairs at The Hague, and on June 1, 1928, the convention came into force for those seven states. On June 12, 1928, the convention was registered with the Secretariat of the League of Nations at Geneva.

The text of the convention has been published in various places. In November, 1925, the text (in French) was published in *La Propriété Industrielle*.[2] In 1926, the *Actes de la Conference de la Haye* were published, setting forth the text (in French). The French text and an English translation of the convention were published by the British Government in 1926,[3] before the convention was ratified by His Brittanic Majesty, and in 1928 the French text and an English translation were published by the British Government in the British Treaty Series.[4] Although these publications were available to him, the writer desired a text of this convention for use in the United States, as it might have been translated and published by the Government of the United States. On November 9, 1928, he addressed the

[1] 38 Stat. 1645, Supplement to this Journal, Vol. 6, p. 122.

[2] 41 *La Propriété Industrielle*, p. 221.

[3] In Papers and Correspondence relative to the Conference of the International Union for the Protection of Industrial Property held at The Hague, November, 1925, pp. 105, 117.

[4] British Treaty Series, No. 16, Cmd. 3167 (1928). The text of the convention published in this Journal for January, 1929 (Vol. 23, Supplement, p. 21) is taken from the British Treaty Series.

United States Patent Office, Department of Commerce, Washington, asking for a copy of the text of the convention, and he was informed that the Patent Office had no text for distribution. The writer then addressed the Superintendent of Documents, Government Printing Office, asking for the text of the convention, and he was informed that the French and English texts were "still held confidential," and that his request had been referred to the Department of State. Later, on December 29, 1928, the writer was informed by an official of the Department of State that since "the injunction to secrecy has not been removed" he was unable to send "a copy of the text as printed by the Senate."

The situation then seems to be this. In 1925, representatives of the United States signed a treaty the ratification of which would effect an important change in the law of the United States. Since February, 1927, the treaty has been before the Senate for consent to its ratification. Since 1925 its text has been public, having been first published (in French) by an international bureau which the United States helps to maintain at Berne. The convention has been registered by the Secretariat of the League of Nations. There can be no possible reason for a desire on the part of the Government of the United States that the text of the convention should be kept secret. Yet at the end of 1928, more than three years after the treaty was signed, no American official document is available to an American lawyer who would study the convention, nor can he obtain the text of the convention from any department of the Government of the United States. He is therefore handicapped in his advice to clients whose industrial property rights will be affected by the ratification of the convention.

Senate Rule 36

Why does such a situation exist? It is due to the "injunction of secrecy" which obtains with respect to treaties signed by representatives of the United States until the Senate has released the texts for publication or has given its advice and consent to their ratification.[5] The standing rules of the Senate provide as follows (Rule 36, paragraph 3):[6]

> All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy, or unless the same shall be considered in open Executive Session.

[5] When the advice and consent of the Senate is given, the injunction of secrecy is now invariably removed and the text of the treaty is published in the Congressional Record. As indicating the practice, see 70 Congressional Record, p. 2371 (January 26, 1929). When the Senate consented to the ratification of certain of the Bryan treaties on August 13, 1914, the fact did not appear in the Congressional Record at the time, but the record of the executive session was later published. 59 Congressional Record, p. 3693.

[6] Senate Manual (1925), p. 38.

The substance of this became a rule of the Senate on December 22, 1800,[7] and it has not since been materially modified. In 1885, the Senate Committee on Rules, reporting on the operation of this rule, stated "that it extends the injunction of secrecy to each step in the consideration of treaties, including the fact of ratification; that no modification of this clause of the rules ought to be made; that secrecy as to the fact of ratification of a treaty may be of the utmost importance, and ought not to be removed except by order of the Senate or until it has been made public by proclamation of the Executive." [8] While "there is no inflexible rule requiring closed doors," yet "it has been the almost uniform practice of the Senate, since the organization of the Congress, to consider treaties, presidential nominations and confidential communications from the President and the heads of the executive departments within closed doors." [9]

When the Constitution was being adopted, secret treaties and secret negotiations between governments had not been proscribed by public opinion as they are today. Throughout the *Federalist*, it was assumed that treaties should be kept secret, at any rate until they were finally brought into force.[10] It was argued that this was possible in the Senate and not possible in the House of Representatives, and for this reason the constitutional provision was defended requiring the "advice and consent" of the former body only. The earlier sessions of the Senate were held behind closed doors, and it was not until 1794 that this practice was abandoned.[11] In that year a rule was adopted providing that on the motion of any Senator, seconded by another, the doors might be closed for dealing with any matter requiring secrecy.[12] Under a special "injunction of secrecy" the Jay Treaty was considered by the Senate in 1795;[13] the Senate's action in not publishing the Jay Treaty was "because they thought it the affair of the President to do as he thought fit." [14] When the present rule was adopted in 1800, there was this background of thought and precedent to justify it, and in a Senate composed of but twenty-six members, it was a relatively simple thing to maintain the secrecy thought to be necessary.[15]

[7] 1 Senate Journal of Executive Proceedings, p. 361; Gilfry, Precedents in the Senate (1914), p. 423; Crandall, Treaties, Their Making and Enforcement (2d ed.), p. 84. The provision for removing the injunction of secrecy was added by the amendment of March 6, 1888.

[8] 17 Congressional Record, p. 77. [9] Gilfry, Precedents in the Senate (1914), p. 247.

[10] See The Federalist (Ed. by Lodge, 1888), p. 469.

[11] Gilfry, Precedents in the Senate, p. 248. By 1797 "it had become the usual custom to order treaties to be printed in confidence for the use of the Senate." Hayden, The Senate and Treaties, 1789–1817 (1920), p. 107. Apparently no treaties were made between 1789 and 1794. Butler, The Treaty-Making Power (1902), p. 420.

[12] This is the effect of what is now Rule 35 of the Standing Rules of the Senate.

[13] 1 Senate Journal of Executive Proceedings, p. 178.

[14] Alexander Hamilton, quoted in Hayden, *op. cit.*, p. 90.

[15] For an account of the violation of the injunction of secrecy with reference to the Jay Treaty, see Hayden, *op. cit.*, p 89.

Practice of the Executive

A rule of the Senate is not binding on the President.[16] Yet it has long been the practice of the Executive to withhold the texts of treaties signed on behalf of the United States from publication, pending final action by the Senate. It is therefore the Senate, and not the President, which usually decides when the time has come, prior to ratification by the President, for a treaty text to be published. This decision may be taken by the Senate's resolution that its own consideration of the treaty shall be in public and not in executive session;[17] or, as is more often the case, it may be due to the Senate's ordering the "injunction of secrecy" to be removed before or after it has voted to give its advice and consent to ratification. In either event, according to the present practice the text of the treaty will then be published in the *Congressional Record*.[18] The function thus assumed by the Senate, and acquiesced in by the President, may be defended as a method of orderly procedure, assuring to the Senate the privilege of learning of the text of a treaty from the President and not from the newspapers, and protecting the Senate in the exercise of its constitutional power to give or withhold advice and consent, before the treaty text has been published. If these reasons seem convincing on Capitol Hill, they may be less so at the other end of Pennsylvania Avenue. But the President has observed this rule of courtesy without challenge for many years, out of "deference to the Senate's procedure".

The practice is not uniform, however. When a great public interest is aroused, the text of a treaty signed on behalf of the United States is often published before it is submitted to the Senate. This is frequently the case, in recent years, with respect to multipartite instruments. The text of the Paris pact for the renunciation of war was published by the Department of State without objection by the Senate, as soon as it was signed on August 28, 1928. So, also, the texts of the Inter-American Conciliation and Arbitration treaties, signed at Washington on January 5, 1929, were at once released for publication. Even bipartite treaties are sometimes published after signature and before action by the Senate.[19] Under the existing practice, it may prove difficult for the Executive to follow either course, and friction

[16] In an interesting note on "Government By Secret Diplomacy," Dean John H. Wigmore has recently stated that the Department of State "is *not allowed by the Senate*" to print or make public a duly signed treaty until after the Senate removes "the injunction of secrecy". 23 Illinois Law Review (1929), p. 689. But it is submitted that the Senate has not power to forbid such action by the Executive.

[17] Such a resolution must be adopted in executive session, according to a precedent followed on January 15, 1912, with reference to the arbitration treaty with Great Britain. See Gilfry, Precedents of the Senate, p. 253.

[18] This is the present practice, but it seems to be recent in origin.

[19] Foster refers to "the fisheries treaty of 1888" as having been "acted upon in open Senate." John W. Foster, The Practice of Diplomacy (1906), p. 279. The text of this treaty had previously been published in Canada. 2 Butler, Treaty-Making Power (1902), p. 380.

with the Senate has sometimes resulted. When the conditions of peace were presented to the German representatives at Paris on May 7, 1919, it was decided by the Supreme Council, against the insistence of M. Clemenceau, that only a summary should be published.[20] President Wilson's failure to communicate these conditions of peace to the Senate was severely criticized in that body.[21] By early June, 1919, copies had reached the United States, and on June 9, 1919, Senator Borah read the conditions of peace into the *Congressional Record*.[22] Objection was made by Senator Swanson on the basis of Rule 36, paragraph 3, but was overruled by the presiding officer;[23] clearly the rule had no application. The Treaty of Versailles was signed on June 28, 1919, and the text was made public at the time; when it was submitted to the Senate by the President on July 10, 1919, it seems to have been generally assumed to be unnecessary to remove the "injunction of secrecy" and the debate was held in public session.

Secrecy with Reference to Nominations

Senate Rule 36, paragraph 3, concerning secrecy of treaties is to be compared with its Senate Rule 38, paragraph 2, concerning the secrecy of "all information communicated or remarks made by a Senator when acting upon nominations," as well as of "all votes upon any nomination." The latter has frequently been the subject of criticism. In 1886, a determined effort was made to change it.[24] Recently, Senator Norris has vigorously attacked it,[25] and on January 28, 1929, Senator Jones proposed that it be amended by adding to Rule 38 the following new paragraph (No. 7):

> Hereafter nominations shall be considered in open executive session unless the Senate, in closed executive session, shall by a two-thirds vote determine that any particular nomination shall be considered in closed executive session, and in that case paragraph 2 of this rule shall apply to such nomination and its consideration.

This proposal was debated in the Senate on January 31, 1929,[26] but no action was taken concerning it.

It seems even more important that Rule 36 should be amended, and perhaps in the direction of Senator Jones' proposal as to Rule 38. Much water has passed over the dam since the Senate rule was adopted 129 years ago. The attitude toward secrecy in public affairs, and especially in treaty relations, has been radically changed. Fifty-five countries have committed

[20] Ray Stannard Baker, Woodrow Wilson and World Settlement, I, pp. 157–160.

[21] 58 Congressional Record, pp. 157 *ff*, 558–561.

[22] *Ibid.*, pp. 802–857.

[23] *Ibid.*, p. 799. See 70 Congressional Record, pp. 2754 *ff*.

[24] See 17 Congressional Record, pp. 966, 1192, 2610, 6308; 70 *id.*, p. 2607.

[25] George W. Norris, "Secrecy in the Senate," The Nation, May 5, 1926 (Vol. 122, p. 498). See, also, Dorman B. Eaton, Secret Sessions of the Senate (1886).

[26] 70 Congressional Record, pp. 2603–2613.

themselves to have no secret treaties or engagements.[27] For the United States there is no temptation to keep engagements secret after they are finally concluded.[28] Secrecy may therefore be eliminated, or at any rate reduced, in the process by which our treaties are made. Before a treaty is signed, the negotiations may have to be withheld from the public, though recently a good example was set in the negotiation of the Paris pact for renunciation of war which was conducted in the open. But once a treaty has been signed, it would be only very exceptional circumstances which might call for withholding the text from publication. Whether those circumstances exist, can better be determined by the executive who is familiar with the preliminary negotiations than by the Senate.[29] If the President and Secretary of State should find no impelling reasons which call for keeping the text of a signed treaty secret, then its text should be released at once; and it is in line with the duty of the Department of State to educate public opinion on our relations with other states, to make the text available to those who are interested.[30] This is even more important where a multipartite treaty is concerned, and where people in other countries are likely to have available texts not available in the United States, as is true of the Convention on Protection of Industrial Property of November 6, 1925.[31]

Suggestions for the Future

It may be necessary for the Senate to have provision in its rules for its own consideration of treaties when it is asked for advice and consent to their ratification. Even with the text made public, the Senate might desire to debate a particular treaty in closed executive session. That case will be the exception and not the rule, however, and the rule of 1800 ought to be changed to make it so.[32] At the present time, the Senate will usually con-

[27] In Article 18 of the Covenant of the League of Nations. See Manley O. Hudson, "Registration and Publication of Treaties," this JOURNAL, Vol. 19, p. 273.

[28] An "additional secret article" was added to the treaty with Mexico of February 2, 1848. *Cf.*, 3 Stat., 472; David Hunter Miller, Secret Statutes of the United States (1918). See also David Hunter Miller, My Diary at the Conference of Paris, Vol. 2, p. 337.

[29] Of course there might be cases in which the government of the other party to the treaty would desire that the text be withheld from publication pending ratification.

[30] In rare cases, the texts of international conventions are published by other departments of the government than the Department of State. Thus, the text of the Convention on the Protection of Literary and Artistic Works, signed at Rome, June 2, 1928, was published in the 1928 Report of the Register of Copyrights, by the copyright office of the Library of Congress.

[31] On February 25, 1929, the injunction of secrecy was removed from the Slavery Convention signed at Geneva on September 25, 1926, when the Senate consented to accession to that convention. 70 Congressional Record, p. 4311. As the text of the convention has been public since September 25, 1926, having been published by the League of Nations' Secretariat and by various other bodies, there is a touch of irony in this removal of the injunction of secrecy.

[32] Rule 37, paragraph 3 of the Senate's Standing Rules now reads: "All treaties concluded with Indian tribes shall be considered and acted upon by the Senate in its open or legislative

sider in public any treaty in which the public manifests much interest, while treaties of no general popular concern, such as those dealing with the protection of industrial property, will be relegated to executive session. The rule ought to be that all treaties will be considered in public unless the President submits a particular treaty in confidence or unless the Senate specially determines that a particular treaty should be considered otherwise.

The writer presents, therefore, two suggestions:

> (1) That for the creation of the public opinion upon which our Government's policy depends, the President and Secretary of State adopt it as a policy to publish the texts of all treaties as soon as they are signed, unless special circumstances in any case necessitate the maintenance of secrecy until a treaty can be ratified.
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> (2) That the Senate rules be amended by the Senate to provide that all treaties which may be submitted for the advice and consent of the Senate shall be considered in open executive session unless under Rule 35 the Senate shall determine that a particular treaty shall be considered in closed executive session.

These suggestions would still leave it possible for the President in a rare case to submit a treaty for the advice and consent of the Senate as a confidential communication, and for the Senate to deal with it in closed executive session.

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session, unless the same shall be transmitted by the President to the Senate in confidence, in which case they shall be acted upon with closed doors."

THE SOVIET SECURITY TREATIES

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It is now more than a decade since the Soviet Government took over control of the Russian state. During that period the government has had to face and has attempted to solve, in terms compatible with its special ideology, the problem of permanent adjustment to a world with radically divergent conceptions of the legal order. How that international adjustment has thus far been made becomes a question of genuine importance, for, in proportion as it has materialized in treaty form, it has thrown new light on the major problem of regional and international security. In the ensuing pages the foundations, buttresses and superstructure of a system of security as conceived in Moscow will be dealt with, and the relation they bear to the rival systems of Geneva and Washington considered. It is believed that the polices of the Kremlin have developed, in a decade, on the basis of positive treaty law, the broad framework of a system of security having far-reaching legal significance.

Just as the existing arrangements for security in Western Europe are inescapably superstructures reared upon the foundations laid down by the Conference of Paris, so, in Eastern Europe and on the borders of the Soviet world, the edifice of security erected by Moscow rests fundamentally on the treaties which closed for Russia her part in the conflict beginning in 1914. The existence of these treaties, their at least casual enforcement, their binding validity and force are, then, the prerequisite and determinant factors underlying the construction of the Soviet security system.

The basic principles on which that treaty nexus was established may be briefly recalled: the treaties laid down the conditions by which the independence of the limitrophe states, the restoration of normal relationships with Russia, and the prevention of the recurrence of such wars as had just closed, could all be assured. To that end the treaties, after acknowledging the independence of new-born states, provided reciprocal military guarantees against future attacks, established a series of regulations intended to prevent the abuse of the territory of signatories by illicit groups of various kinds, canonized non-intervention as a principle of self-preservation and assumed—implicitly, it is true—the pursuit of a policy of neutrality by signatories toward each other in the event of the occurrence of hostilities in their environs. On such basis peace was restored to the regions ravaged by war and counter-revolution.[1]

[1] The treaties in question are: (1) The treaty of Tartu (Estonia), February 2, 1920, 1 *Sbornik Deistvuiushtchikh Dogorovov* (hereafter cited as *Sbornik*), 100–116, especially Arts.

Western Europe required a period of consolidation to permit the further elaboration of a system of security, and the principal signatories of Versailles played with alliances, sponsored various projects of regional understanding and devised various paper schemes for security during the years 1922–1925. Likewise, in the same period, Russia and her neighbors sparred for time, perfected their internal reorganization, inaugurated discussions of security, both regional and local, and sounded out both the political and psychological possibilities of permanent understanding. At the close of this period the first concrete gains by way of systematic security provisions were registered in both quarters. In the West there was built a system based on Geneva and interwoven with conceptions borrowed from the Covenant; in the East, there began to be constructed a rival edifice of security centered on Moscow and shot through with much of the ideology of the Kremlin. The architecture and the edifices of Geneva and Locarno are familiar; the craftsmanship of the Muscovite structure is less well known. It constitutes, in its own distinctive way, an alternative system of security, the ideas pervading which are continually coming into closer juxtaposition to the systems of Geneva, Locarno and Washington. Based, as are its competitors, on a foundation of positive treaty law, the Soviet system merits careful and serious investigation.

It is a matter of historic record that the Soviet Republic, at the very time when it was seeking to crystallize its internal structure into a constitutional union, invited its principal western neighbors to confer at Moscow on the possibilities of mutual security through disarmament. The Conference of Moscow proved politically a failure, for reasons which are largely alien to this discussion, but realized no small gains by making evident both to Russia's neighbors on the west and to the commissars in Moscow the basic factors to be taken into account by any security settlement. It stood clear on the records of the disrupted conference that Russia, irrespective of its outcome, was ready to "renounce the use of armed force for the solution of conflicts," was willing to undertake at any time the concurrent discussion of disarmament and security, would consider negotiations on a collective or individual basis, but preferably collective, and was ready to make full allowances for other obligations undertaken by her western neighbors under the aegis of

3–7; (2) Treaty of Moscow (Georgia), May 7, 1920, 1 *Sbornik*, 27–33, especially Arts. 2–6; (3) Treaty of Moscow (Lithuania), July 12, 1920, 1 *Sbornik*, 50–62, especially Arts. 4–5; (4) Treaty of Riga (Latvia), August 11, 1920, 1 *Sbornik*, 35–49, especially Art. 4; (5) Preliminary Peace of Riga (Poland), October 12, 1920, 1 *Sbornik*, 63–73, especially Art. 2; (6) Treaty of Dorpat (Finland), October 14, 1920, 1 *Sbornik*, 76–99, especially Arts. 12–16; (7) Treaty of Moscow (Persia), February 26, 1921, 2 *Sbornik*, 36–41, especially Arts. 2–7; (8) Treaty of Moscow (Afghanistan), February 28, 1921, 2 *Sbornik* 15–17; (9) Treaty of Moscow (Turkey), March 18, 1921, 2 *Sbornik*, 72–77; (10) the final Treaty of Riga (Poland), March 18, 1921, 2 *Sbornik*, 43–71, especially Art. 5; (11) Treaty of Kars (Turkey), October 13, 1921, 3 *Sbornik*, 49–57, and (12) the Provisional Agreement of Prague (Czechoslovakia), June 5, 1922, 4 *Sbornik* 17–21.

the League of Nations, so long as these were not directed against Russia herself.[2] Russia further assumed the position that machinery of peaceful liquidation must be created to take care of the disputes which could not be settled through regular diplomatic channels.[3]

Up to the meeting of the Conference of Moscow, Russia had preferred to give precedence to disarmament over security; at that gathering she resolved, as has been noted, to deal with both problems on a par and concurrently. However, as the prospects of securing simultaneous agreement receded, the Russian view veered and by 1924, through a technical delegate at the Rome Naval Disarmament Conference, the Soviet Government announced that "political treaties form the indispensable premises of the decisions which the different states can take on this subject" (disarmament).[4] While undoubtedly influenced by the desire to accelerate *de jure* recognition—a process which had already begun—this utterance marks the reversal of former policy and an insistence on political solutions, not technical disarmament, as the initial bases of a genuine system of security.

By the fall of 1924 it was clear to the observers of Soviet policy that Russia was ready to renounce force, accept peaceful measures for the settling of international disputes, and give certain guarantees of non-aggression in political treaties preliminary to any moves for actual disarmament. How-

[2] *Cf.* the remarks of M. Litvinov at the Moscow Conference: "The Russian delegation conceives the difficulty there is in talking of disarmament as long as peace has not been guaranteed politically. But we believe that the treaties bearing our signature constitute a guarantee of peace and non-aggression as real as any other new paper bearing our signature. . . . But, independently of the result of the present negotiations, Russia renounces the use of armed force for the solution of conflicts. . . . On my side, in my capacity as President of the Russian Delegation and Commissar *ad interim* of the People for Foreign Affairs, I declare categorically in the name of the Russian Government that Russia has no intention of attacking the territory of its neighbors far or near, nor of resolving its controversies by force of arms" (*Conference de Moscou pour la Limitation des Armements* (Moscow, 1923), pp. 100, 102, 103). The viewpoint of the Soviet Government as regards the League of Nations was likewise made clear by M. Litvinov: "It must be borne in mind that among the states disposed to sign the agreement we are drafting is Russia, which is not a member of the League of Nations and which, according to all probabilities will not soon be. . . . There may arise a situation where all the states represented may unite either among themselves or with other states members of the League of Nations, to annul or modify unilaterally the projected treaty. It is evident that Russia can in no way admit such an eventuality." *Ibid.*, p. 133.

[3] This view was expressed by Litvinov in the following language: "It is desirable that a convention relative to arbitration should be signed by the states represented at the conference. The Russian delegation has never rejected in principle the idea of arbitration and does not do so now. It confines itself to pointing out its insufficiency and to indicating that the fact of signing such an agreement would not yield the desired results" (in the direction of disarmament). *Ibid.*, p. 97. It should be noted, however, that while, in the draft proposals of the disrupted conference Russia gave her assent in principle to the *arbitration* of a limited category of disputes, she was not bound, after the failure of the negotiations, to adhere to the specific modalities of liquidation there mentioned.

[4] Such was the statement of the Russian representative, Admiral Berens. *Cf. Le Temps*, February 17, 1924.

ever, it appears obvious that no systematic plan for the execution of these principles had been devised. It remained for two major events in the diplomacy of Western Europe to force the hand of the Soviet Government. These two events were the signing of the Geneva Protocol and of the Locarno treaties respectively. In the Geneva Protocol Moscow saw only a legalization of the most extreme coercive measures which had been directed against Russia by outside Powers at the height of the civil war. Hence the Kremlin and all its emissaries railed at the document as a new evidence of conspiracies in the capitalist world against the Soviet state. Although the protocol died at the hands of those whom Russia had thought most anxious to use it against her, the same cry of alarm was raised a year later against the Locarno settlement, despite its narrower scope and more limited application. The Locarno treaties, once signed, sharply challenged the diplomacy of Moscow. With the gauntlet flung at the Soviet world by the sealing of a major security agreement in Western Europe, the Soviet Government found it both necessary and possible to counter. It did so by the Treaty of Paris of December 17, 1925, signed almost on the morrow of Locarno. This inaugurated a new policy and opened a new stage in the establishment of a security system.

The system elaborated since 1925 comprises a set of six major treaties to which the Soviet Government is a signatory, and two ancillary treaties between neighboring states which bear all the earmarks of Soviet influence and are, if not essential to the working of the system, direct reinforcements of it.[5] They are in all instances bilateral agreements, although the diplomatic history of the period, particularly from 1922 to 1926, is strewn with rejected offers of multipartite pacts.[6] It would appear that, largely because of the

[5] These are (1) The Treaty of Paris (Turkey), December 17, 1925, 4 *Sbornik* (U. S. S. R.), No. 2, 15–16; (2) the Treaty of Berlin (Germany), April 24, 1926, 53 League of Nations Treaty Series, 392–396; (3) the Treaty of Paghman (Afghanistan), August 31, 1926, *Sobranie Zakonov i Rasporiadjenii*, Part 2, No. 3, January 20, 1928, Document 16, pp. 45–48; (4) the Treaty of Moscow (Lithuania), September 28, 1926, *Izvestia*, No. 225, September 30, 1926; (5) the initialed Treaty of Riga (Latvia), March 9, 1927, *Izvestia*, March 11, 1927; and (6) the Treaty of Moscow (Persia), October 1, 1927, *Ekonomitcheskaia Jizn*, October 2, 1927, while the ancillary treaties, of no little importance to the working of the general system, are (1) the Treaty of Teheran (Persia-Turkey), April 22, 1926, *Echo de la Turquie*, June 16, 1926, reinforced by the Additional Protocol of Teheran, June 15, 1928, European Economic and Political Survey, Vol. 3, No. 21, July 15, 1928, p. 718, and (2) the Treaty of Kabul (Persia-Afghanistan), November 28, 1927, *Le Messager de Teheran*, February 10, 1928, reinforcing the briefer Treaty of Teheran, June 22, 1921, 33 League of Nations Treaty Series, 285–302, which embodied the germinal principles of the later pact. The recent treaty between Turkey and Afghanistan, May 25, 1928 (European Economic and Political Survey, Vol. 3, No. 18, May 15–31, 1928, p. 590), is not included as it lacks, for reasons of non-contiguity of the signatory states, most of the earmarks of the other treaties.

[6] *Cf.* "Verhandlungen über einen Ostpakt," *Europäische Gespräche*, Vol. IV (1926), pp. 398–401, 621–625; Bredt, D., "Russische Rückversicherung," *ibid.*, pp. 403–417, and "Baltic Security Pact Negotiations," European Economic and Political Survey, Vol. I, No. 18, May 31, 1926, pp. 14*ff.*, and Vol. II, pp. 51*ff.*, for general discussions of the negotiations. An interesting survey of the situation from the Russian standpoint is given by A. Rykov in *Izvestia*, April 20, 1927.

difficulty, learned by experience, of proceeding on so large a scale as demanded by multilateral pacts, Russia determined, after 1924, to conclude the treaties essential to the solution of her own immediate problem of security on a bilateral basis without thereby closing the door to future multipartite negotiations.[7] In view of the bilateral character of the treaties, it is obvious that, although they conform, as indicated by Litvinov, to a single general plan, they each have a separate genesis and *raison d'être*. It being impossible to deal here with the specific background of each security settlement, it need only be noted that, irrespective of its internal content, each treaty was consciously timed by Soviet diplomacy to discredit, so far as possible, the diplomacy of the Western Powers, and to give the Soviet world renewed assurances of the capacity of the Commissariat of Foreign Affairs to cope with the latest "intrigues" and "encirclements" undertaken against Russia by the "capitalist" world.

When subjected to a minute analysis, the treaties reveal as their essentials a number of important points which they possess in common and which constitute, along with the elemental guarantees embodied in the treaties of peace of 1920–1921,—on which the new treaties rest, and to which they refer most explicitly,—the framework of a distinctive security system.

The outstanding provisions in the treaties are the non-aggression, anti-blockade, neutrality and pacific settlement clauses. It being the endeavor of the treaties to define the bases of permanent peace and understanding between the signatories, a number of contingencies are provided for, in order "to determine the exact conditions facilitating the consolidation of stable normal relations."[8] Of all these, the assurances against aggression are by far the most important. These consist, first and foremost, of pledges of abstention from attack on each other, of non-aggression stipulations pure and simple.[9] Next there are pledges of refusal to participate in hostile

[7] *Cf.* the remarks of M. Litvinov, Acting People's Commissar for Foreign Affairs, on December 23, 1925, *à propos* the Treaty of Paris, characterizing it as "an important step along the road to general peace": "The best indication of the peaceful tendency of the agreement is the readiness of the Soviet Government to conclude analogous agreements with all countries with which it is in normal relations. Only a system of concluding between all nations agreements similar to the Soviet-Turkish one will preclude the possibility of the formation of political groups and combinations antagonistic to one another and thereby really foster the prevention of wars, something that cannot be accomplished through the machinations of the League of Nations or those of the Locarno sort" (Russian Review, Vol. IV, No. 2, January 15, 1926, pp. 28–29).

[8] Such is the actual expression in the preamble to the Treaty of Moscow with Persia, October 1, 1927; similar expressions are found in the preambles of the Treaty of Paris and the Turco-Persian Treaty of Teheran, indicating the conscious desire, in the post-war period in the Middle East, to establish objective rules governing international conduct.

[9] "Each of the contracting parties binds itself to abstain from any attack upon the other; each likewise binds itself not to take part in any alliance or agreement of a political character with one or more outside powers directed against the other contracting party, as well as in any alliance or agreement with one or more outside powers directed against the military or naval security of the other contracting party. In addition to this, each of the two con-

or minatory acts of third Powers, embracing, in particular, blockade measures. These, as has just been noted, may assume a variety of forms, such as simple acts, or consciously perfected alliances or agreements of a political, military or naval, or economic and financial character directed against the security of signatories.[10] The effect of these clauses is to bind the signatories mutually and reciprocally to specified courses of action which will avoid injury to the co-signatory. It is particularly interesting to note that whereas in the earliest treaty, that of Paris, the idea of economic boycott is scarcely touched upon, the anti-blockade feature is more firmly embedded and anchored in each succeeding treaty, and reaches wider and wider application. The two treaties negotiated following the Anglo-Russian breach of May, 1927, *i.e.*, the Soviet treaty with Persia and the Persian treaty with Afghanistan, are by all odds the most ample in their anti-blockade stipulations, although the Treaty of Berlin is perhaps the most significant. After the bitter experiences of the Russian civil war, the Soviet Union has endeavored to forestall not only the coarser military interventions, disposed of in the peace treaties of 1920–1921, but also every type of boycott or blockade.

Second in importance are the neutrality clauses, which have a peculiar significance in reinforcing the security obtained by the non-aggression provisions. They are a unique and distinctive feature of the Soviet system. All of the treaties without exception have such clauses in either rudimentary or amplified form. The reason for these stipulations is that, if aggression should threaten from one particular quarter, it is essential to general security that the remaining countries affected by the treaty system should not be

tracting Powers binds itself not to participate in any hostile act by one or more Powers aimed against the other contracting party." Treaty of Paris (Turkey), Art. 2. In this, the first of the security treaties, the non-aggression stipulations are combined indiscriminately with the anti-blockade features. *Cf.* Treaty of Teheran (Turkey-Persia), Art. 3; Treaty of Paghman (Afghanistan), Art. 2; Treaty of Moscow (Lithuania), Art. 3; Treaty of Moscow (Persia), Art. 2, par. 1: "Each of the contracting parties undertakes to abstain from every attack and aggressive action against the other party and from advancing its armed forces into the territory of the other party" and Art. 3, par. 1. "Each of the contracting parties undertakes not to participate either *de facto* or formally in political alliances or agreements directed against the security of the other party, on land or at sea, or against its integrity, independence or sovereignty." These provisions are virtually identic with the corresponding paragraphs of the Treaty of Kabul. Interestingly there is no express pledge of this character in either the Treaty of Berlin or the Treaty of Riga, the latter simply stating that "both parties undertake not to join any coalition which would be directed against the political independence or against the territorial integrity of the other party" without explicitly promising non-aggression in blanket form.

[10] Treaty of Paris, Art. 2, embracing, according to Protocol 2, "all financial and economic agreements"; Treaty of Teheran, Art. 3; Treaty of Berlin, Art. 3, referring solely to non-participation in economic and financial boycott; Treaty of Paghman, Art. 2, mentioning both boycott *and blockade;* Treaty of Moscow (Lithuania), Art. 4, closely modeled on the Treaty of Berlin; Treaty of Riga, Art. 2; Treaty of Moscow (Persia), Art. 3, par. 2: "Moreover, both contracting parties are to refuse participation in economic boycotts and blockades organized by outside Powers against either of the contracting parties"; Treaty of Kabul, Art. 3, virtually identic with the corresponding clause of the Treaty of Moscow with Persia.

at liberty to assist an aggressor. To Russia there is a very real connotation to "aggression" and every effort has been bent by the Soviet Government to insure that, if it is impossible to arrive at a system of mutual assistance, and Russia has not walked that far in the ways of Geneva, at least no open aid shall be given the aggressor. The attempt made at the Moscow Conference to permit differential neutrality or, as it is coming to be termed, partiality, by pledging no assistance to the aggressor while leaving the signatory states free to aid one another, having failed, Russia reverted to the old and unreformed law of nations, to build on the historic foundations of neutrality, uninfluenced by Geneva protocols or Locarno agreements, the structure of security.[11]

The neutrality clauses are classifiable into three types. The first is employed in the early Levantine treaties, the pledge being made to observe and maintain neutrality in the event of hostilities involving one of the contracting parties, without attempting to ascribe any moral quality to, or make any ethical appraisal of, the cause of conflict or the conduct of third Powers.[12] A second type is used in dealing with Occidental countries, in which special value is attached to pacific behavior and in which the emphasis is placed upon attack on one of the contracting parties as bringing into effect the *casus foederis*.[13] The third type is used in the latest Levantine treaties, in which the moral judgments involved in the second type are affirmed and a correlative pledge of an absolute character, binding the attacked party most stringently not to violate the neutrality of its co-signatory, is laid down.[14] When viewed in the ensemble, and in the light of chronological succession, they reveal clearly the growth of a moral idea and of an increasing sense of

[11] In this the Soviet Union was influenced by manifold considerations of a political character, such as the possibility of creating a new balance of power between communist and capitalist states, but these are beyond the scope of this discussion.

[12] Treaty of Paris, Art. 1; Treaty of Teheran, Art. 2; Treaty of Paghman, Art. 1. These refer to "military action or operations" in a colorless, objective, non-moral way. Persia and Afghanistan had already paved the way for these expressions in Art. 9 of the Treaty of Teheran of June 22, 1921, which reads: "In the event of one party becoming involved in a war with a third Power, the other party, in accordance with the rules of neutrality, binds itself not to favor the third Power in any respect" (33 League of Nations Treaty Series, 285–302). It will be noted that this article did not prescribe neutrality, but proscribed any type of *benevolent* neutrality, doubtless due to Persia's experiences in the World War. Contrast this stipulation with the phraseology of the Treaty of Kabul, *infra*.

[13] Treaty of Berlin, Art. 2; Treaty of Moscow (Lithuania), Art. 3, both of which stress pacific behavior, and Treaty of Riga, Art. 1, all of which specifically speak of "attack" and imply moral censure. Peculiarly, the Lithuanian treaty stringently avoided the use of the word "neutrality," in order not to affront Geneva, much as Washington avoided the term in his first proclamation of neutrality in 1793 in order not to affront Paris. The meaning of the clause is, however, beyond question.

[14] Treaty of Moscow (Persia), Art. 2, par. 2; and Treaty of Kabul, Art. 2, pars. 2, 3. These are phrased to condemn attack, and then impose a new obligation on the attacked party "regardless of any strategical, tactical or political considerations or advantages" not to violate the neutrality of the other party.

obligation and responsibility for the maintenance of the peace of the world. It is also interesting to note that echoes of Belgium's tragedy in 1914 which, in a measure, was Persia's tragedy as well, continue to ring down the corridors of history into the Levant and the Middle East.

The object of the neutrality clauses is distinctly to permit the forecasting with assurance of the conduct of nations in given contingencies, or, to put it differently, the computation in advance, and in virtue of a legal rule, of a nation's political behavior. Resting no longer on an implicit and tacit presumption of neutrality, as was the wont of nations in the days before the World War, Russia has reversed the practice of more than a century and a half in order to calculate, in terms of pre-acknowledged conduct, the possibilities of actual security against attack. This would appear to be the principal constructive achievement of the whole treaty system. By it Russia has markedly lessened the opportunities for the occurrence and spread of war. The new doctrine of definite foreknowledge, as thus embodied in the various treaties, appears, in the political theology of Moscow, to offer a more excellent way than provided by the old law of nations for salvation from the imminent menace of war.

But the neutrality and non-aggression features are not all. The completing element in the Russian security system is the arrangement for the creation of machinery for the pacific settlement of all disputes not liquidated by the ordinary processes of diplomacy.[15] The attitude of the Soviet Government toward the different types of procedure for pacific settlement is not without interest in this connection. Ever since its inception, the Soviet Government has manifested an unqualified distrust of the methods of judicial settlement, because of the conceptions of property, value, appraisal, fiscal obligation, etc., inherent in a judicial system and palpably contradictory to certain hypotheses of the Soviet legal order, if not to basic tenets of even a pseudo-communist economy. Therefore the Soviet Government has rejected on numerous occasions the conception of justiciable settlement and has not concurred in the idea of the division of questions into those of a justiciable and a non-justiciable character, as generally accepted by Western countries. Similarly, there has been basic objection to arbitration, in so far as the economic and juridical presuppositions of judicial procedure carry over, albeit in diluted form, into the formalities and the substance of arbitral

[15] Protocol 3 of the Treaty of Paris, the final paragraph of the notes exchanged at the time of the signature of the Treaty of Berlin, Art. 4 of the Treaty of Paghman, and Art. 5 of the Treaty of Moscow with Persia all make blanket promises to settle all kinds of differences "by peaceful means suitable in each particular case." This is paralleled in Art. 8 of the Treaty of Teheran. Art. 5 of the Treaty of Moscow and an uninitialled article to be included in the Treaty of Riga both provide for conciliation commissions, in the latter case to be headed by a neutral chairman. (*Cf. Le Temps*, March 12, 1927, p. 2, c. 2.) Only the special protocol attached to the Treaty of Kabul makes provision for "arbitrators" as such, whereas the description of their rôle in fact makes them conciliators. Russia, it will be recalled, is not a signatory of the Treaty of Kabul.

settlement. Only at the Conference of Moscow, as has already been noted, and only in regard to the interpretation of treaties of which it was itself scheduled to be a signatory, did the Soviet Government agree, even in principle, to the idea of arbitration. Its idea has been to regard all questions on which there is not substantial enough agreement between the parties to admit of diplomatic settlement as being so fundamentally controversial as to warrant the employment of the machinery of conciliation. This, as exemplified in conciliation commissions, is the only form of pacific settlement which the Soviet Union is willing to recognize.[16]

Precedent for such conciliation commissions under the major security treaties has not been lacking. Paritary commissions had, as a matter of historic record, been employed following the basic peace settlements of 1920–1921. The difficulty of approaching third, or "outside," Powers in order to obtain members for the conciliation commissions envisaged in the treaties is a very substantial one, and as yet, the formal details, save as regards Latvia, have not been settled in any instance. How to secure a "conciliator" who would be free from bias toward either a "capitalist" or a "communist" state is a problem not easy of solution. In the case of Latvia, agreement on a "neutral" presiding officer or umpire marks an important concession by Russia and is a distinct advance over the position previously taken by the Soviet Government. But even here it is difficult to say what meaning might attach, in a concrete controversy, to the word "neutral." [17]

[16] It is interesting to note the frequent insistence by essentially conservative members of the legal profession upon *judicial* settlement as the all-important, if not exclusive means of solution of international difficulties. There is also the general tendency of the public at large, almost the world over, to think of *arbitration* as the term synonymous with pacific settlement, and to advocate it for all types of controversies indiscriminately; this seems to be thoroughly representative of the broad, middle-of-the-road type of mind. Lastly there is the insistence just noted on the part of Soviet diplomats, on *conciliation* as the all-sufficient form of pacific settlement. (*Cf.* on this point the Russo-German Conciliation Convention signed at Moscow on January 25, 1929, *L'Europe Nouvelle*, 12me année, No. 574, Feb. 9, 1929, pp. 190–191. In all likelihood it is the fluid, supple character attaching to the conciliatory process, the wide latitude of discretion which it affords, its comparative freedom from rigid procedural trammels and conceptions, say, of vested rights of a legal character —in short, it is its dependence upon the inherent reasonableness and fairness of recommendations of conciliators rather than upon stratified conceptions derived from pre-existing social, political and economic systems that gives to conciliation an unusual appeal to the radical, if not revolutionary, mind.

[17] Three possible meanings suggest themselves as within the range of usage: (1) the sense in which a "neutral" chairman would be chosen *from a country other than Russia or Latvia*—this in the strictest sense of the word *neuter;* (2) as referring to a *national of a country not a participant in the World War or,* alternatively, *in the Russian civil war*—a sense which would exclude nationals of most countries members of the League of Nations; (3) as referring to *a national of a country which has pre-pledged to the Soviet Union its future political and military neutrality.* In this sense citizens of all the nations which have concluded security and neutrality treaties with the Soviet Union would be eligible; likewise those of Estonia and Lithuania merely in the light of the policies of permanent neutrality for those countries predeterminedly outlined in 1920 in the Treaties of Tartu (Art. 5) and Moscow (Art. 5.)

It is immaterial here to discuss the remaining details of the Soviet security system. From a juridical standpoint that system stands squarely outlined as based upon positive treaty law and as endeavoring objectively to determine in advance the conduct of neighboring countries toward the Soviet Union. The rules laid down in the treaties, while equally binding on both signatories of each bilateral pact, are differential in their incidence according to the contingency involved in each case. There is the direct and immutable obligation placed on each signatory to limit its actions toward the cosignatory to those of a peaceable character. The secondary and less direct obligation is, in the case of aggression by third Powers, to maintain a régime of neutrality with positive and inescapable obligations. The final obligation and the completing factor in the system is the elaboration of the machinery of peaceful liquidation. The cardinal features are, of course, the first and the third, while the second is necessitated by the fact that the Soviet Union, by its very anomalous international position, was not able, at the time the treaties began to be negotiated, to make its arrangements extensive or its commitments wide. Beginning rationally and with no illusions, on the bilateral basis, it had, of necessity, to provide for the contingencies of action by outside Powers. Only as the incremental force of such security treaties cumulated, if the system was enlarged in application, would the peace-insurance value grow and lessen the possible contingencies of neutrality. The Soviet treaty system was, from its inception, meant to be intensely practical and utilitarian, but was never intended to be exclusive in its scope. Although only the dimmest possibilities of realization of a universally applicable system were foreseen in the Kremlin, it must be said in all fairness to Soviet diplomacy that the extension of the system was envisaged from the beginning. In other words, while the system was conceived of as fulfilling first of all certain primordial needs of the Soviet Union, there was nothing inherent in the scheme to prevent its universal application. To avoid the direct possibility of war by the categorical, yet reciprocal renunciation of all forms of aggression; to restrict the scope and the incidence of wars by unconditional, yet mutual pledges of neutrality and non-participation in hostile acts undertaken by third powers; to provide, in bold outlines, a supple machinery of pacific adjustment and liquidation of controversies—such have been and remain, the prime objectives of the Soviet system of security.

The relation of the Soviet security system to the series of obligations imposed upon the signatories and adherents to the Pact of Paris has, since the formal act of adhesion by the Soviet Union,[18] become a matter of genuine im-

[18] On August 27, 1928, through its ambassador at Moscow, the French Government extended to the Union of Socialist Soviet Republics the invitation to adhere to the Pact of Paris. On August 29 the proposal of the Commissariat of Foreign Affairs to adhere to the pact was duly ratified and the formal act of adhesion, accompanied by a long note of explanation, was forwarded on August 31 to the French Government for transmission to Washington, where it was received on October 1. *Cf.* State Department press releases re-

portance. It is immaterial here to discuss the juridical weight of the arguments which might be brought forward as to the legal right of the Soviet Union to be included in the negotiations regarding the Pact. The interest of the Soviet Government in the Pact was due to a number of factors, some of legal right and some merely of political prestige, while the desire of the Moscow commissars to participate in any arrangement which would reinforce the existing securities, while not involving any new commitments as regards the League of Nations, was very real. On this point, at least, it may be said that Moscow and Washington were in fundamental agreement. Inasmuch as the Pact, according to its own terms, offers equality of status, obligation and incidence to both signatories and adherents, it is here important only to note the relationship of the renunciatory and pacificatory clauses to the corresponding parts of the Soviet treaty system.

As regards the two fundamental articles of the Pact of Paris, there can be no basic contradiction between Article 1, the renunciatory clause, and the non-aggression commitments of the Soviet Government in its various treaties. It is primarily in the scope of the renunciatory commitments that differences are to be found. In the Soviet treaties, as has already been seen, the renunciation of war (in the sense of acts of aggression of any kind) has been total and unqualified as between contracting signatories, while under the Pact of Paris, certain indefinite rights of interventional war-like action and the pronouncedly inalienable right of self-defence have, through preliminary interpretations and understandings, been reserved and excluded from the operation of Article 1.[19] Mr. Kellogg's guiding consideration appears to have been to legislate a presumption of non-aggression into the law of nations and little more, as the absence of machinery of enforcement would clearly indicate. If the basic premise of the treaty holds and war is effectively

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produced in the United States Daily, October 2, 3, 1928. A *TASS* dispatch from Moscow under date of September 18, 1928, cites *Izvestia* as pointing out that the resolution of ratification was passed on the same day on which the Soviet Government decided to adhere. "The resolution was passed by the presidium in the interval between two sessions of the Central Executive Committee and, according to the Constitution, such a resolution is an act substituting for the decision of the committee itself. Regarding international treaties concluded by Russia as well as acts of adhesion, a resolution of the presidium is an act of ratification."

[19] *Cf.* on these points paragraph 10 of the British note of May 19, 1928, reserving Britain's "freedom of action" with regard to "certain regions" (not specified in the correspondence) "the welfare and integrity of which constitute a special and vital interest for our peace and safety" and in regard to which "His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered." The British Government also concurs in the view of Secretary of State Kellogg, expressed on April 28, 1928, that "That right (self-defence) is inherent in every sovereign state and is implicit in every treaty" as well as "inalienable." *Cf.* Proceedings of the American Society of International Law, 1928, p. 143, and Notes Exchanged between the United States and other Powers on the Subject of a Multilateral Treaty for the Renunciation of War, reprinted in the United States Daily, Aug. 10, 1928, and Supplement to this JOURNAL, January, 1929, pp. 1–13.

renounced, there is then no need to discuss the status of neutrality either as between signatories or as between signatories and adherents, on the one hand, and non-signatories or non-adherents on the other, primarily as the invitation to all civilized Powers to adhere to the Pact of Paris has made it intentionally universal in its potential scope and application.[20] To the extent, therefore, that the signatories and adherents to the Pact of Paris have really renounced war, they have of necessity renounced neutrality also, as neutrality, in its last analysis, is a co-function of the status of war. Hence it is only by a frank presumption of the violation of the treaty or by conceding to it only a most restricted application that the question of the neutral relationship, as a general status and position in a system, can arise.

According to the preamble of the Pact of Paris, in the event of the breakdown of the principal renunciatory stipulations, the various signatories and adherents are to deny the benefits furnished by the treaty to the violator of the treaty, *i.e.*, they regain their liberty of action as against the violator.[21] Their actions revert to the unreformed laws of war and neutrality, as they emerged at the end of the World War, as obviously a breach of the treaty by the defaulting signatory produces *de facto* a condition of war. Under the circumstances three hypotheses arise: The first is that the signatories will act solidarily as though they were at war with the treaty-breaker. Such a hypothesis is tenable, however, only on the supposition that the general declaration in the preamble of the Pact of Paris overrides the obligations of signatories under the Covenant of the League of Nations, the Locarno treaties and the neutrality treaties to conform to the procedure under the

[20] The problem here involved is, of course, a purely practical one, which will cease to exist if the Pact of Paris is universally accepted. Meanwhile a rapidly diminishing theoretical problem exists whose solution is, of necessity, governed by the positive rules of international law applicable as between potential parties to such a conflict.

[21] This principle of the recovery of liberty of action is implicit in the preamble but most explicit in the correspondence preceding the signature of the Pact. For examples of the understandings on this point *cf.* the French note of March 30, 1928, declaring that "if one of the signatory states were to fail to keep its word, the other signatories should be released from their engagement with respect to the offending State." This was inserted as Article 3 of the French draft treaty of April 20, 1928. Similarly the German Government declared: "It is self-evident that if one state violates the pact the other contracting parties regain their freedom of action with reference to that state. The state affected by the violation of the pact is therefore not prevented from taking up arms on its own part against the breaker of the peace" (Note of April 27, 1928). The same view is set forth in paragraphs 6–8 of the British note of May 19, 1928. The Canadian Government, in its note of May 30, 1928, made it clear that in its view the treaty did not "impose any obligation upon a signatory in relation to a state which has not signed the treaty or has broken it," and added that "any decision to apply sanctions . . . would not appear to conflict with the obligations of the treaty." The Government of the Union of South Africa took it for granted, in its note of June 15, 1928, "that a violation by any one of the parties of any of the provisions of the proposed treaty will free the other parties from obligation to observe its terms in respect of the party committing such violation." This is also confirmed in paragraph 3 of the Czechoslovak note of acceptance of July 20, 1928.

respective treaties by which they have been bound. It can scarcely be conceived to be the guiding principle of the Pact of Paris to promote a *bellum omnium in unum*, in the event of its violation. All that it is possible to say is that the signatories, in default of any other commitment, recover their *right to go to war*, but are under no obligation to do so.

The second hypothesis is that the signatories will, in the absence of any other rules, recover their *right to remain neutral*, and that they may be presumed to be bound, as a corollary of the principle of pacific settlement, to remain aloof from the war in an endeavor to localize it, and restrict its operation. This hypothesis, which harks back to the pre-1914 status of the law of nations is not unacceptable from the Soviet point of view because it takes no note of many of the doctrines underlying the Covenant of the League of Nations which are objectionable to Moscow. If it be accepted, however, it must be viewed in the light of the rights of signatories and adherents under the League Covenant, the neutrality treaties and the Locarno agreements, all of which prescribe, not blanket courses of action, but specified rules of conduct under given contingencies. Hence the situation of the different signatories or adherents, bound as they are by their divergent commitments, cannot be uniform under either of these hypotheses. It would appear that the only basis on which the Soviet treaties would remain unaffected by either of the two foregoing hypotheses would be if they are to be included under the reservation applying to the nebulous "neutrality treaties." [22] If this be in fact the case, there can be no question that the Pact of Paris not only does not invalidate the Soviet treaties in any contingency, but gives explicit recognition to them.

There remains a third hypothesis: that violation of the renunciatory clause leaves it to the discretion, and the pre-existing commitments, of signatories and adherents as to what action will be most effectual, *within the limits of the law of peace*. It goes without saying that the duty of observing the pacificatory clause *inter se* is still binding upon signatories and adherents. That League members should, in such an eventuality, be able to pursue,

[22] During most of the diplomatic correspondence preliminary to the signing of the Pact of Paris the phrase "treaties guaranteeing neutrality" was used (*cf.* the American notes of February 27, April 13, and June 23, 1928, and the French note of March 30, 1928), although the topic was initially mentioned in the discussion of the commitments of the Powers, including "international conventions relative to guarantees of neutrality" "which engagements impose upon them duties which they cannot contravene." Without explicitly mentioning the neutrality commitments, Baron Tanaka, in his note of May 26, 1928, referred blanketly to "agreements guaranteeing the public peace." In all the correspondence after June 23, reference was made to "neutrality treaties" or "treaties of neutrality" (American note of June 23, French note of July 14, Czechoslovak note of July 20). It is not impossible that a change in the meaning of the phrase used, to make it more inclusive, was consciously intended by M. Briand and Dr. Beneš, especially as the obligations undertaken in the preamble of the Provisional Agreement of Prague of June 5, 1922, to maintain neutrality under all circumstances affecting Russia and Czechoslovakia, form a basic element in Czechoslovak foreign policy.

consistently with the terms of the Covenant, a course of non-hostile but coercive conduct, short of both war and neutrality, is entirely conceivable.[23] In other words, violation of the Pact of Paris might lead to the application of sanctions without producing either war or neutrality. That, under such circumstances, and particularly in view of the reservation of their rights under the League of Nations Covenant,[24] the *casus foederis* of the Soviet treaties would not arise for those signatories who are also League members, seems equally obvious. Thus only Turkey and Afghanistan would in reality recover their full liberty of action in the event of the violation of the Pact of Paris. Practically, however, they would recover their liberty of action, *i.e.*, the right to go to war or, alternatively, to remain neutral, only as regards nations to which they were not bound by security treaties. Against Russia or Persia they could not move except in violation of their treaties with those countries, a contingency rather unlikely on the part of countries seeking to enforce the sanctity of treaties. The same, *mutatis mutandis*, would in reality be the case for the Soviet Union itself.

When viewed from a broad perspective, from the standpoint of the demands made upon Russia by the Pact of Paris, it is not difficult to see why the Soviet Union found it possible to adhere. The Pact demanded only the universalization, in truncated form, of the non-aggression obligations which Russia had already contracted toward a select number of limitrophe or neighboring states; it pledged her in terms virtually identic with those of her previous commitments to use the processes of peaceful adjustment for the liquidation of all outstanding controversies. In the last analysis, therefore, it was not due to some sudden whim in the Kremlin, nor to an overnight conversion to a new cause, but rather to the fact that a renunciatory and pacificatory system of its own fashioning, built in turn upon a foundation or

[23] *Cf.* Graham, M. W., "The Effect of the League of Nations Covenant upon the Theory and Practice of Neutrality," California Law Review, July, 1927, Vol. 15, No. 5, pp. 357–377, for an exposition of this point of view.

[24] The Persian attitude was made clear in Art. 9 of the Treaty of Teheran, leaving Persia free to undertake any other commitments. This was reiterated in Art. 6 of the Treaty of Moscow, and Art. 7 of the Treaty of Kabul. On signing the Treaty of Moscow, however, Persia made it clear that it had assumed no contradictory commitments, and yet declared that the Persian Government would respect and carry out all its obligations under the Covenant (Protocol I and exchange of notes of October 1, 1927, *Ekonomitcheskaia Jizn*, October 2, 1927). This would make it appear that Persia sees no conflict between her obligations under the three treaties in question and the Covenant.

The German attitude was made clear in the third paragraph of the notes exchanged at the time of the signing of the Treaty of Berlin, whereby no clash between the obligations of the treaty and those of the Covenant was envisaged (53 League of Nations Treaty Series, 395). Similar views were expressed by the Lithuanian Government in the exchange of notes at the time of the signature of the Treaty of Moscow (*Izvestia*, September 30, 1926), and by the Latvian Government in the negotiations preceding the Treaty of Riga (*cf.* sec. 2 of the Latvian note of April 28, 1926, Riga *Sevodnia*, May 8, 1926). The Estonian and Finnish Governments seem to have shared this opinion in their negotiations with the Soviet Union (Riga *Sevodnia*, May 7, 1926; *Izvestia*, August 3, 1926).

pre-existing positive treaty law, was already in operation, that the Union of Socialist Soviet Republics found it possible to subscribe without delay to the simpler provision of the Pact of Paris.[25] In this course there was only the most rigid consistency, and the commissars in the Kremlin were not long in discovering, enveloped in the phraseology of Washington and Paris, treaty stipulations which can be traced back almost without deviation, both as regards phraseology and substance, to the proposals all but adopted at the Conference of Moscow.[26] It is a fact not without some irony that the stone which the builders of Baltic security rejected little more than half a decade ago has, by a tortuous evolution of ideas, become the cornerstone in Mr. Kellogg's new edifice of international security.

[25] The same reasoning applies to the proposal made by M. Litvinov on December 29, 1928, to Poland, to put the provisions of the Pact of Paris immediately into force as between Russia and Poland. The result of this move, *viz.*, the signing of the so-called Litvinov Protocol, at Moscow, February 9, 1929, between Estonia, Latvia, Poland, Rumania and the Soviet Union, in nowise changes the principles involved. For the text of the protocol, *cf. L'Europe Nouvelle*, 12me année, No. 578, March 9, 1929, pp. 325–326.

[26] The similarities may best be noted in the following manner:

PACT OF PARIS

ARTICLE I. The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

ARTICLE II. The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

ARTICLE III, PAR. 2. This treaty shall . . . remain open as long as may be necessary for adherence by all the other Powers of the world. . . .

(This JOURNAL, Supplement, Vol. 22, pp. 172–173.)

MOSCOW CONVENTION

ARTICLE I. The high contracting parties solemnly and mutually pledge themselves to abstain from every act of armed aggression on their respective territories, fixed by the treaties of peace or other agreements establishing the frontiers, concluded among the limitrophe states, in the case where such treaties already exist and in conformity to the present *status quo* where treaties of peace or other agreements determining the frontiers may not yet have been concluded.

ARTICLE IV. The high contracting parties declare that they will solve by peaceful means all the differences and conflicts which might arise between their states.

ARTICLE VI. Adhesion to this convention is open, with the consent of the contracting parties, to other states not parties hereto.

(*Conference de Moscou pour la Limitation des Armements, Annexe II au Proces-verbal de la Seance du Bureau du 8 decembre, 1922*, pp. 152–153.)

THE SINKING OF THE *I'M ALONE*

By William C. Dennis

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The sinking on the high seas of the Canadian registered schooner *I'm Alone* as a suspected rum runner resisting boarding for enquiry (visit and search) by the United States Coast Guard patrol boat *Dexter* after a two days chase from a point a short distance off the coast of Louisiana, has given rise to considerable discussion in the press of the United States and Great Britain, and suggests several interesting questions of international law and treaty construction.

The facts in the case as viewed by the respective parties in interest have not been fully developed. In particular, no official statement from any quarter has been made public at this writing (March 30th) as to the exact distance from the American coast at which the *I'm Alone* was first hailed for the purpose of visit and search or as to the distance which could "be traversed in one hour" either by the *I'm Alone* or by any other vessel on which it was intended to convey liquor from the *I'm Alone* to the United States.[1] However, the various official statements and press association despatches which have been published disclose the general situation and indicate some of the questions of fact and law which are likely to arise.

According to an official statement of the United States Coast Guard given out by the Treasury Department under date of March 25th,[2] the *I'm Alone* "was a notorious liquor smuggler . . . built and especially designed for rum running." She was of the type of a Gloucester fisherman, was equipped with 200 horsepower auxiliary engines, and was "registered at Lunenburg, Nova Scotia." On March 12th she "cleared from Belize with liquor for Hamilton, Bermuda." The facts, from the hailing of the *I'm Alone* by the United States Coast Guard patrol boat *Wolcott* on the morning of March 20th until her sinking on the morning of March 22nd by the United States Coast Guard patrol boat *Dexter* (the *Wolcott* also being close up), are given as follows in the Coast Guard statement:

> On March 20 the Coast Guard patrol boat *Wolcott* picked up the *I'm Alone* within twelve miles of the Louisiana coast, the vessel thus being some 500 miles off her course for Bermuda. The *Wolcott* called upon the smuggler to heave to for boarding and examination, as authorized by the U. S. Tariff Act. The order of the United States vessel was refused, whereupon the *Wolcott* fired across the bow of the *I'm Alone*, hailed the

[1] See the Convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, signed January 23, 1924, Treaty Series 685; Supplement to this Journal, Vol. 18, p. 127; *infra*, p. 353. Since the foregoing was written a press despatch carries an apparently informed statement fixing the distance of the *I'm Alone* from the coast as between ten and eleven miles.

vessel, and was defied by her master. The *Wolcott* then fired through the smuggler's sails and rigging, but the *Wolcott* could not stop the *I'm Alone* because the gun jambed.

The *I'm Alone* fled, being continuously pursued by the *Wolcott*, and by the Coast Guard patrol boat *Dexter* which joined in the chase.

The *Dexter* overhauled the *I'm Alone* on the morning of March 22, the *Wolcott* also being close up. The master of the *I'm Alone* was told to heave to. He refused, saying that he would be sunk first. The *Dexter* megaphoned to the *I'm Alone* that he would have to sink her, but he first fired warning shots ahead, which the smuggler did not heed. The *Dexter* then fired through the rigging, but still the smuggler refused to stop. The master of the *I'm Alone* had a pistol and had waved it in a threatening manner. Finally the *Dexter* was compelled to fire a number of shots into the smuggler's hull, and the vessel sank. The Coast Guard rescued all the *I'm Alone* crew except one man who was drowned. The Coast Guard men worked for two and a half hours trying to resuscitate him.[2]

Under date of March 28th the United States Coast Guard gave out an additional statement in which it was said that: "Not only was the *I'm Alone* within four leagues of the coast, but she was squarely within treaty limitations."[3]

On the other hand, the captain of the *I'm Alone* is quoted in the Associated Press despatches of March 25th as stating that his vessel was fourteen-and-a-half to fifteen miles off shore at the time he was first hailed by the *Wolcott*. He adds that he and his men were well treated, but expresses surprise that he was put in irons and kept there until the *Dexter* arrived in New Orleans. Otherwise his statement does not differ materially from the Coast Guard account. The captain of the *I'm Alone* is further quoted in a London Associated Press despatch of March 27th as having said to a London paper over the Atlantic telephone:

> I went into this liquor trade with my eyes open. I knew all the risks but I never expected a raw deal like this. It's a miracle of luck that I am here talking to you over the telephone. It's no fault of the customs men we aren't all drowned.[4]

The British Ambassador and the Canadian Minister have made inquiries at the State Department in regard to the case.[5] The French Embassy also appears to be interested in view of the fact that the seaman who was drowned is said to have been a French citizen.[6]

The pertinent provisions of statutory and conventional law are as follows:

1. AMERICAN MUNICIPAL LAW

§481. *Boarding vessels or vehicles; seizure of vessel or merchandise.* Officers of the customs or of the Coast Guard, and agents or other per-

[2] U. S. Daily, March 26, 1929. [3] U. S. Daily, March 29, 1929.

[4] Associated Press despatch, Washington Evening Star, March 27, 1929. (Later) The Canadian Minister has filed a formal communication with the Department of State. U. S. Daily, April 10, 1928.

[5] New York Times despatch, March 26, 1929.

[6] Associated Press despatch, March 27, 1929.

sons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.[7]

2. CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN FOR THE PREVENTION OF SMUGGLING[7a]

Article I. The high contracting parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters.

Article II. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examinations show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded,

[7] U. S. Code, Sec. 481, Customs Law of Sept. 21, 1922, Chap. 356, Title 4, Sec. 581, 42 Statutes 979; see also U. S. Code, Sec. 488, Customs Law of Sept. 21, 1922, Chap. 356, Title 4, Sec. 586, 42 Statutes 980; Criminal Code, Sec. 37, U. S. Code Title 18, Sec. 88. (The criminal proceedings against the captain and the crew of the *I'm Alone* have been dismissed. U. S. Daily, April 10, 1928.)

[7a] The convention, which was agreed to after a favorable report by the British Imperial Conference (Jessup, p. 289, note 16), is regarded as applicable to Canadian registered vessels. See Ford *v.* United States (1927), 273 U. S. 593, at 603.

which shall determine the distance from the coast at which the right under this article can be exercised.

Article III. No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.[8]

The foregoing statement of the law and the facts suggests the following hypothetical questions among others:

I. Assuming that the *I'm Alone* was originally hailed outside the three-mile limit of territorial waters[9] and within the twelve-mile limit[10] and also within the one hour's steaming radius,[11] were the proceedings of the United States Coast Guard vessels lawful?

(a) The answer to this question depends primarily upon whether the "universally recognized"[12] international law doctrine of "hot pursuit"[13]

[8] Convention between the United States and Great Britain for the Prevention of the Smuggling of Intoxicating Liquors, signed Jan. 23, 1924, proclaimed May 22, 1924, Treaty Series No. 685; Supplement to this JOURNAL, Vol. 18, p. 127.

[9] International law and convention with Great Britain, Art. 1.

[10] U. S. Code, Sec. 481.

[11] Convention with Great Britain, Art. 2, paragraph 3.

[12] Oppenheim, International Law, 2nd ed., p. 336.

[13] The authorities in regard to the doctrine of hot pursuit are collected in Jessup, Law of Territorial Waters (1927), pp. 106–110; Hyde, International Law (1922), Vol. 1, pp. 420–421; Dickinson, "Jurisdiction at the Maritime Frontier," Harvard Law Review, November, 1926, p. 1 at p. 21, notes 80 and 81. See particularly Hall, International Law, 8th ed. (1924), p. 309, 4th ed. (1895), p. 266; Westlake, International Law, 2d ed. (1904), Part 1, p. 177; Woolsey, International Law, 6th ed. (1891), p. 71; Oppenheim, International Law, 2d ed. (1912), p. 336; address of Secretary Hughes before the Council of Foreign Relations, New York, Jan. 23, 1924, this JOURNAL, Vol. 18, p. 229 at p. 232; "Rules on the Definition and Régime of the Territorial Sea" adopted by the Institute of International Law in 1894, Resolutions of the Institute of International Law, edited by Dr. James Brown Scott, Oxford University Press (1916), p. 113 at p. 115; Amended Draft Convention communicated to various governments by the League of Nations Committee of Experts for the Progressive Codification of International Law, with questionnaire No. 2, Jan. 22, 1926, League of Nations Document C 196 M 70, 1927, V, p. 72, Art. 10; *The North* (1905), 11 British Columbia Law Reports, p. 473, affirmed (1906), 37 Canada Supreme Court Reports, p. 385; the *Marianna Flora* (1926), 11 Wheaton 1, star p. 42; the *Rosalie M.* (1925), D. C., S. D. Texas, 2 Fed. (2d), p. 815 at p. 816; the *Homestead* (1925), 7 Fed. (2d), p. 413 at p. 415; the *Vinces* (1927), 20 Fed. (2d), p. 164 at p. 167; United States *v.* The Resolution, decided Jan. 23, 1929, D. C., E. D., La.; the case of the *Itata*, Moore's Digest of International Law, Sec. 316, Vol. 2, p. 985, Moore's Digest of International Arbitrations, Vol. 3, pp. 3067–3071.

from territorial waters can be applied by analogy to the one hour's steaming radius provided by Article 2, paragraph 3, of the convention with Great Britain. If that convention had in terms extended the three-mile limit to, let us say, twelve miles for the "limited purpose"[14] of preventing the operations of rum runners, it could hardly be doubted that the doctrine of hot pursuit would apply, and it is submitted that this is in substance what the article does. Doubtless the language employed—"the rights conferred by this article shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour," etc.—was selected with a view to keeping perfectly clear the distinction between territorial waters in general and waters made territorial *ad hoc*, as it were, only for the purpose of dealing effectively with rum runners.

Any interpretation denying the right of hot pursuit of a vessel escaping from the one hour's steaming radius fixed by the convention would largely defeat the generous purpose manifested by Great Britain in the correspondence leading up to the convention and destroy the value of the concession granted to the United States in Article III as a *quid pro quo* for the relaxation in Article IV of American law with respect to liquor carried under seal on British vessels. As the Supreme Court of the United States has said:

> The treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels, through the waters and in ports of the United States, of sealed sea stores and sealed cargoes of liquor for delivery at other destinations than the United States.[15]

The right of hot pursuit starting from beyond the three-mile line and within the one hour's steaming radius fixed by the convention has been expressly affirmed by the United States District Court for the Eastern District of South Carolina and reaffirmed by the Circuit Court of Appeals of the Fourth Circuit in the case of the *Vinces*. The *Vinces* was a vessel of British registry with a speed of eight and one-half miles per hour. She was ordered to halt when proceeding shoreward outside the three-mile line and "within seven and one-half miles of Seabrook Island, the nearest point of land." She was captured when twelve and three-quarter miles from shore, *i.e.*, beyond both the statutory limit and the limit fixed by the convention. The question of the right of hot pursuit under the convention with Great Britain was discussed by the District Court in the following language:

> The first point made by counsel for the claimant is that the treaty states that the rights conferred "shall not be exercised at a greater distance from the coast of the United States, its territories or possessions,

[14] British note of September 27, 1923, press release Feb. 20, 1927, quoted by Jessup, p. 288.

[15] Ford *v.* the United States (1927), 273 U. S. 593 at 609. See summary of correspondence leading up to the treaty, Jessup, Chap. 6, pp. 279–289.

than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." He practically concedes that, as far as the 12-mile limit is concerned, if a vessel comes within that limit, under the law of necessity she may be pursued beyond that limit and there captured; but he says that this principle is not applicable under the British treaty, because the treaty itself says that the rights conferred shall not be exercised at a greater distance from the coast than one hour's sailing.

A strict and literal interpretation of the treaty might lead to this conclusion, but I cannot think that the contracting parties had such result in mind. Every argument based on necessity, and the right of the United States to pursue beyond the 12-mile limit and seize there, is applicable with equal force to the rights to be exercised under the British treaty. If a vessel can come within one hour's sailing distance, and evade the rights conferred by the treaty by escaping beyond that distance, then the treaty is in great measure nullified. Indeed, the learned counsel practically concedes that such would be the case. I apprehend that a vessel under British registry is bound by her laws and by the treaties of that country, and when such a vessel comes within an hour's sailing distance, and the officers of the United States have probable cause, as prescribed by the treaty, then it is the duty of the British vessel, when properly hailed, to stop and submit to examination. If she does not so stop, the United States has the right to compel her to stop, and in pursuance of this undoubted right may pursue her and enforce it, even though the offending vessel escape beyond one hour's sailing distance of the coast.[16]

On appeal to the Circuit Court of Appeals, counsel for the *Vinces* appear to have abandoned the objection to hot pursuit beyond the treaty limit, but the point was nevertheless noticed by the court in the following language:

No point is made that the vessel was actually overhauled and the seizure actually made beyond the hour's sailing distance and beyond the 12-mile limit, if she was within these limits when signaled; and we think it is clear, under the "hot pursuit" doctrine, that if the right of seizure existed at the time the vessel was signaled, the right was not lost because she had succeeded in getting farther from shore in her attempt to run away. Hudson *v.* Guestier, 6 Cranch, 281, 3 L. Ed. 224; Ship North *v.* King, 37 Can. Sup. Ct. 385, 3 Ann. Cas. 806; "Jurisdiction at the Maritime Frontier," by Prof. Dickinson, Harvard Law Review, Nov., 1926, and citations in notes 80 and 81.[17]

The question of the right of hot pursuit under the convention with Great Britain which may be raised in the case of the *I'm Alone* is therefore not novel but has been specifically raised and squarely decided in favor of the right by a District Judge and a Circuit Court of Appeals of the United States. The Supreme Court of the United States has not yet spoken on the point, and on such a question of treaty construction not even the decision of the highest court in the land would necessarily preclude an

[16] The *Vinces* (1927), 20 Fed. (2d), 164, at 174–175.

[17] The case of the *Vinces* on appeal to the Circuit Court of Appeals appears as Gillam *v.* United States (1928), 27 Fed. (2d), 296 at 299.

appeal via diplomatic channels to an international forum, but it is submitted that the decision in the case of the *Vinces* on this fundamental point is good law and good sense.

(b) Assuming that the doctrine of "hot pursuit" may properly be invoked in aid of the authority and jurisdiction within the one hour's steaming radius conferred by the convention with Great Britain, did the conduct of the American Coast Guard vessels in this case qualify as "hot pursuit" within the meaning of the authorities? It is submitted that it did.

Hall's discussion of the doctrine of "hot pursuit" in his classic work on *International Law* is not only generally conceded to be a sound exposition of the principles involved, but, as in the case of many another passage in Hall, has through quotation and adoption by the courts become in itself an authority. Hall's text is quoted and relied on by the Supreme Court of Canada in the case of *The North*,[18] an American vessel which was engaged in fishing in contravention of Canadian fishing laws within Canadian territorial waters and which was pursued and captured one and three-quarter miles outside the three-mile limit. The passage from Hall, which was quoted in part by the court in that case, reads as follows:

> It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or of the persons on board might be doubtful.[19]

Hall, therefore, rests the doctrine of hot pursuit upon the necessity that territorial jurisdiction be efficiently exercised and limits it to immediate pursuit in order that it may not lead to abuses growing out of mistaken identity. No question of mistaken identity would appear to arise in the instant case.

Sir Charles Russell, *arguendo* before the Behring Sea Arbitration Tribunal, where the thesis which he was maintaining would naturally lead him to contend for the strictest possible limitation of the right of "hot pursuit," defined the limitations of the right in the following frequently quoted passage:

> For instance, one condition is it must be a *hot* pursuit—that is to say, a nation cannot lie by for days or weeks and then say: "You, weeks ago, committed an offence within the waters, we will follow you for miles, or hundreds of miles, and pursue you." As to that, it must be a *hot* pur-

[18] 37 Canada Supreme Court Reports, 385 at 394; see discussion of this case in Jessup, Territorial Waters, pp. 107–108.

[19] Hall, International Law, 4th ed., p. 267, 8th ed., p. 309.

> suit, it must be *immediate*, and it must be *within limits of moderation*. In other words, we are still considering the character of the act which is not defined by international law, *which is not a strict right by international law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavoring to commit a fraud against the laws of a friendly Power.*[20] [Italics in original.]

Sir Charles' suggestion that the doctrine of "hot pursuit" rests on mere acquiescence rather than right is, it is submitted, clearly contrary both to principle and authority, but his statement of the conditions under which that acquiescence will be forthcoming is none the less interesting.

It would appear that the pursuit in this case was "hot," within any reasonable definition of that term. In the language of the second statement of the Coast Guard: "There is no doubt whatever that there was hot, continuous and unbroken pursuit of the smuggler from the time she was first sighted until she was sunk."[21]

In this case the hot pursuit appears to have lasted for about two days, and presumably covered a corresponding distance, but it is believed that while this is unusual it is not legally important. The *Itata* was pursued from California to Chile and, although the United States and Chilean Claims Commission pronounced the action of the United States in that case in insisting upon the surrender of the *Itata* to be unjustified, it was only upon the ground that the pursuit should have terminated on the entrance of the *Itata* into Chilean territorial waters.[22] Article 8 of the "Rules on the Definition and Régime of the Territorial Sea," adopted by the Institute of International Law in 1894, provides: "The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third Power."[23] And Article 10 of the "Amended Draft Convention Communicated to various governments by the League of Nations Committee of Experts for the Progressive Codification of International Law with Questionnaire No. 2, Jan. 22, 1926" is to the same effect. Aside from this it is believed there is no geographical limitation found in the authorities upon the right of hot pursuit.

It has been suggested in the press that the hot pursuit in this case was in some way vitiated because the *Dexter* joined the *Wolcott*, the vessel which originally hailed the *I'm Alone*, in the chase and the *I'm Alone* was actually sunk by the gunfire of the *Dexter* and not by the *Wolcott*, whose gun appears to have become incapacitated. But if the fact be as set forth in the Coast Guard statement that the pursuit was immediate and continuous on the

[20] Argument of Sir Charles Russell, Attorney General of Great Britain, in the Fur Seal Arbitration. 13 Proceedings, p. 300, p. 1079 of the original report.

[21] United States Coast Guard statement, March 28th, U. S. Daily, March 29, 1929.

[22] See Moore's Digest of International Law, Sec. 316, Vol. 2, p. 985; Moore's Digest of International Arbitrations, Vol. 3, pp. 3067–3071.

[23] Resolutions of the Institute of International Law edited by Dr. James Brown Scott, Oxford University Press, 1916, p. 113 at 115; see Hyde, p. 421.

part of the *Wolcott*, which was "close up" when the *Dexter* sank the *I'm Alone*, it would seem that there is nothing of substance in this point. Even if the *Wolcott* had desisted from the chase and signaled the *Dexter* to intercept the *I'm Alone*, the pursuit being immediate and no question of identity having arisen, query whether this would not be a normal application of the principles of the doctrine of "hot pursuit" to modern conditions.

(c) Finally, assuming the right of hot pursuit from the one hour's steaming radius under the convention and that the exercise of that right on this occasion qualified generally under the authorities, it might still be suggested that excessive force was used by the United States Coast Guard.

So far as this raises a question of law as to the right to sink a recalcitrant vessel if necessary in order to enforce the right of visit and search, the answer would seem clear. Section 481 of the United States Code makes it the duty of the Coast Guard to "stop such vessel" and to "use all necessary force to compel compliance." The rule of international law is the same. Oppenheim, under the heading "How Visit is Effected," defines the *modus operandi* of exercising this right in time of peace as follows:

> The intention to visit may be communicated to a merchantman either by hailing or by the "informing gun," that is, by firing either one or two blank cartridges. If the vessel takes no notice of this communication a shot may be fired across her bows as a signal to bring to, and if this also has no effect force may be resorted to.[24]

In the absence of any special provision in the convention with Great Britain, the ordinary rules of international law would govern visit and search under the authority of that instrument. How much force is necessary in any given case is of course a question of fact. It goes without saying that the dictates alike of law, humanity and common sense require that every reasonable effort be made to avoid the unnecessary destruction of life or property short of permitting a vessel which has been duly summoned to make its escape. It is also clear that the officers of the law are under no obligation to risk their lives unnecessarily in attempting to board a vessel which refuses to heave to and resists boarding by flight or otherwise.

II. There remain two other hypotheses as to the facts which, together with their possible legal consequences, may be briefly noted. Assuming that the *I'm Alone* was originally hailed outside the three-mile limit and within the twelve-mile statutory limit, but outside the treaty-limit of one hour's steaming radius, were the proceedings of the Coast Guard vessels lawful?

(a) This raises in the first place the question as to whether or not the convention with Great Britain is exclusive, that is, completely replaces, so far as hailing and boarding British vessels are concerned, any rights beyond the limits of territorial waters which the United States may have had or

[24] Oppenheim, Vol. I, 2nd ed., 1912, Sec. 268, p. 337; see also Hall, Secs. 273–275, 4th ed., pp. 754–757.

claimed under municipal and international law prior to the convention. Upon this point the lower Federal Courts are not in accord and the Supreme Court of the United States has not yet spoken.[25]

(b) Assuming that the convention with Great Britain is not exclusive, there would then arise the interesting and much discussed question of the validity under international law under any circumstances of seizures under the so-called hovering acts, *i.e.*, acts which assert jurisdiction for the prevention of smuggling and other similar purposes over foreign vessels beyond the territorial waters of a state. For an analysis of the numerous authorities on this subject and discussion of the principles involved, the reader is referred to the recent works of Messrs. Jessup,[26] Hyde,[27] and Dickinson.[28]

III. Assuming that the *I'm Alone* was originally hailed outside the three-mile limit and outside the twelve-mile statutory limit, but within the one hour's steaming radius under the convention with Great Britain, were the proceedings of the Coast Guard vessels lawful?

This hypothesis raises the question whether or not the convention with Great Britain is self-executory and therefore competent to extend American statutory law to the limits of the one hour's steaming radius. The lower Federal Courts are divided upon this point. Mr. Jessup regards the following observation of the Supreme Court of the United States in the Ford case as "of great importance" in this connection:[29]

> The treaty did not change the territorial jurisdiction of the United States to try offences against its importation laws; that remained exactly as it was. If the ship could not have been condemned for such offences before the treaty it cannot be condemned now. If the persons on board could not have been convicted before the treaty they cannot be convicted now.[30]

It is submitted that in any event enabling legislation under the treaty should be enacted.[31]

[25] See Jessup, p. 349, citing the Federal cases. The case of the *Vinces*, both in the District Court and the Circuit Court of Appeals, should now be added to those holding that the treaty is not exclusive. Mr. Jessup invokes a passage in Secretary Hughes' note to the British Embassy of July 19, 1923, as a "conclusive answer" to this view. See Professor Dickinson's earlier views to the effect that the treaty is not exclusive, this JOURNAL, Vol. 20, pp. 111–117; see also Masterson, Jurisdiction in Marginal Seas, p. 360.

[26] Jessup, Law of Territorial Waters, pp. 56, 60, 80–86, etc.

[27] Hyde, International Law, 1922, Sec. 235, p. 417.

[28] Dickinson, "Jurisdiction at the Maritime Frontier," Harvard Law Review, November, 1926, p. 1.

[29] Jessup, p. 352.

[30] United States *v.* Ford (1927), 273 U. S. 593 at 610. For an analysis of the cases in the lower Federal Courts on this point preceding the observation of the United States Supreme Court in Ford *v.* the United States and a discussion of the principles involved, see Jessup, Law of Territorial Waters, Chap. VII; Dickinson, this JOURNAL, Vol. 20, p. 114, p. 444; Masterson, Jurisdiction in Marginal Seas, pp. 368–370; U. S. Treasury Decisions, Vol. 49, p. 937, No. 41613.

[31] See Annual Report of Attorney General of the United States, 1926; Jessup, pp. 300–316.

IV. Fortunately while the public opinion of the countries concerned as reflected in the press has shown great interest in the sinking of the *I'm Alone* and the questions involved, the discussion has been singularly free from acrimony and national partisanship. Indeed it seems quite possible that the views of the man in the street in regard to the transaction will be colored as much by his opinion on the subject of prohibition as by his nationality. The ascertainment of the facts in the case will very possibly enable the Foreign Offices concerned to settle the entire incident through the normal process of diplomacy. If, however, differences of opinion in regard to either the facts or the law should become manifest, the convention between the United States and Great Britain has already provided a ready and happy method for their solution. Article IV of the convention provides as follows:

> Article IV. Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the high contracting parties.
>
> Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.[32]

We have progressed a long ways since the *Trent* affair when it was said that serious difficulty between the United States and Great Britain was only avoided on account of the fortunate breaking of the Atlantic cable. In this case the interview which the irate captain of the *I'm Alone* telephoned to a London newspaper has only contributed to a better understanding of the case by the peoples concerned.

Both countries appear to be ready to approach such questions as were raised by the sinking of the *I'm Alone* in the spirit of the following passage from the work of a leading English publicist, Twiss, quoted with approval by our American Wheaton:

> In ordinary cases, indeed, when a merchantship has been seized on the open seas, by the cruiser of a foreign power, when such ship was approaching the coasts of that power with an intention to carry on illicit trade, the nation, whose mercantile flag has been violated by the seizures waives in practice its right to redress, those in charge of the offending ship being considered to have acted with *mala fides* and consequently to have forfeited all just claim to the protection of their nation.[33]

[32] See the Convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, signed January 23, 1924, Treaty Series No. 685; Supplement to this JOURNAL, Vol. 18, p. 127.

[33] Twiss, Law of Nations, Vol. 1, Sec. 181, p. 263; Lawrence's Wheaton, 2d ed., p. 323.

It is submitted by way of summary conclusion that, if the *I'm Alone* was hailed for the purpose of inquiry within the treaty limit, the subsequent proceedings of the United States Coast Guard vessels upon the facts now appearing were lawful whether tested by international or municipal law. If, however, the *I'm Alone* was hailed outside either of the statutory or the treaty limit, the legality of the proceedings under municipal and international law respectively affords matter for interesting debate.

EDITORIAL COMMENT

THE FREEDOM OF THE SEAS

The open avowal by the supporters of the recent law for the construction of fifteen additional cruisers that one of its principal objects was to enable the United States to maintain the freedom of the seas, at least so far as the right of American vessels to navigate them is concerned, has led to much newspaper and other popular discussion, both in Great Britain and the United States, as to the meaning and implications of the principle known as the freedom of the seas. The chairman of the Senate Committee on Foreign Relations is reported to have said in the course of the debate on the cruiser bill: "If we cannot have an agreement regarding freedom of the seas; if the safety of our commerce must depend entirely on our navy, we will build a navy superior to Britain's." What is in the mind of those who are demanding freedom of the seas is, of course, the right of neutrals during the existence of a state of war, to trade freely with one another and with belligerents, subject only to such restrictions as international law imposes on that freedom.

Since the disappearance of piracy from the high seas they have in fact been entirely free in time of peace for the purpose of legitimate navigation by the ships of all nations; on the exercise of this freedom international law imposes no restrictions. Particular states no longer, as they did in former centuries, assert a claim in the absence of treaty right to interfere with the freedom of navigation on any portions of the high seas. The exclusion by municipal legislation of foreign vessels from the coasting trade, or from the colonial trade of states having distant colonies, dominions or other dependencies, is not regarded as inconsistent with the freedom of the seas, as that principle is generally understood. A somewhat different question was raised by the proposal of the chairman of the Merchant Marine Committee of the United States House of Representatives, at the time of the recent *Caronia* incident (February, 1929), that Congress should by means of discriminatory tonnage duties and heavy income and passenger taxes exclude British merchant vessels from the carrying trade between New York and Havana. It might be argued that such legislation would in effect be tantamount to a denial of the freedom of the seas to British vessels. Whatever may be said of the consistency or inconsistency of such legislation with the established principles of customary international law, it would certainly at least be open to attack as being contrary to international comity.

As indicated above, it is freedom of the seas in time of war for which Americans are contending, that is, freedom of neutrals to navigate the seas, subject to no restrictions except those which are imposed by the rules of international law as they are understood and interpreted in the United States. Briefly stated, these restrictions are the following: (1) the right of a

belligerent, under certain conditions, to exclude by means of a blockade neutral ships from all commerce or intercourse with an enemy state, and to capture and confiscate those violating the blockade; (2) the right to seize and confiscate, under certain conditions, goods denominated contraband, carried by ships, and consigned to places in enemy territory or intended for the use of the enemy, and in certain cases to confiscate also the ships carrying them; (3) to capture and confiscate enemy private property found on an enemy vessel, and (4) to capture and confiscate neutral vessels engaged in what is known as "unneutral service."

During the World War other rights were asserted and exercised by belligerents, such as the establishment of war zones in certain areas of the sea, from which neutrals were excluded, or in which their vessels were exposed to grave danger in case they entered such zones. These measures were denounced by neutrals as infringements upon the freedom of the seas and contrary to the universally recognized rules of international law. But as to the other four classes of restrictions mentioned above, there was no denial by any neutral of their validity under international law as it then existed, and as it exists now. It was only the interpretations which certain belligerents placed upon the rights which international law gave them over neutral commerce and the manner in which they exercised these rights, that provoked neutral protests and charges of violation of the law. What these interpretations were, and what were the particular belligerent acts, the validity of which was denied, are well known, and it is unnecessary to discuss them here. The belligerents to whom the protests were addressed justified their conduct on various grounds: changed conditions and circumstances, which rendered the old interpretations impossible; necessity, if the right conferred was to be exercised effectively, such as the taking of suspected vessels into home ports for search and the virtual blockade of neutral ports; the right of reprisal, etc. Generally speaking, the accused belligerents maintained that the measures against which neutrals protested were not the assertion of new rights, but corollaries of the rights which international law already gave them, or logical and necessary adaptations of the existing rules to the new conditions under which they had to be applied. Furthermore, there were points not covered by the existing rules, and as regards the meaning of some of them, there was and always had been a difference of opinion, especially between Great Britain and the United States. Under these circumstances, the British Government claimed the right to act upon its own interpretation. Finally, in reply to the American protests, the British Government pointed out that when the United States was a belligerent during the Civil War its practice in certain respects did not differ in principle from the British measures against which, as a neutral, it protested in 1915 and 1916. The British can now add that when the United States became a belligerent during the World War it employed its navy to assist in the enforcement of the "so-called" blockade, which as a neutral it had lately

criticised as "illegal"; that by the establishment of an embargo on the shipment of food and other supplies to the neutral countries of Western Europe, particularly the Netherlands, it adopted in effect the principle of the British policy of "rationing" neutrals; and that after vigorously protesting against the British "blacklist" it issued one of its own containing the names of some three times as many proscribed individuals and firms as were on the British "blacklist."

There is no place here to examine the merits or the demerits of the British interpretation or practice or the American protests against the measures of Great Britain. It is sufficient to say, that there was a sharp difference of opinion between the American and British Governments as to the limitations on the freedom of the seas which international law recognizes, or, to be more exact, as to the respective rights of belligerents and neutrals, a difference which it may be assumed to have been honest. The fact that the Government of the United States ceased to protest when it became a belligerent in 1917 against measures, which, as a neutral, it had regarded as infringements upon the principle of the freedom of the seas, and that it even went to the length of aiding Great Britain in the enforcement of those measures, the United States does not consider as estopping it from reviving the question now and insisting upon an international agreement in accordance with its own traditional views.

The war did not settle the issues which were raised by the controversies relative to belligerent and neutral rights. The treaty of peace was silent on all of them. The special agreement of 1917 between the British and American Governments under which each party waived all claims against the other for losses or damages resulting from war measures against commerce, such as the detention of ships, expressly stated that the waiver was made by both parties without prejudice to their claims relative to the legality or illegality of such measures. Each government is, therefore, free to maintain in the future its traditional views, as though the war had never occurred. This leaves the whole question where it was before the war, although it is inconceivable that the views of both parties will not be affected to some extent by the new conditions revealed for the first time by the war, by the results of the experience of the war and by the virtual certainty that the methods and instrumentalities by which the next important maritime war will be carried on will be quite different from those of the last war. But considering the insular character of the British Empire and Great Britain's present naval superiority, it may be expected that, in the main, she will insist upon her traditional views. On the assumption which generally prevails in the United States, even if its validity may be doubted, that in the important maritime wars of the future, the United States is more likely to be neutral than belligerent, the traditional American doctrine of the freedom of the seas may be expected to be maintained. We are confronted, therefore, by a situation in which the most important part of the law of maritime war, the respective

rights of belligerents and neutrals, is in a more or less chaotic state. This is so, because of disagreement between the two principal maritime Powers as to what the law allows and forbids to both belligerents and neutrals. Superficially the difference is merely a point of law and of war law at that. But with the Americans, in their present state of opinion, the difference is much more: it involves the principle of the independence and sovereignty of nations. It is also the root of what may become an era of naval rivalry on a large scale between two countries, which it may be safely assumed have no desire to enter upon so wasteful and unnecessary a diversion of their resources. An agreement on the points in controversy the Americans regard as a condition precedent to a reduction of armaments.

It is with a view to reaching such an agreement that Senator Borah's proposal for an international conference was made, a proposal which was the subject of an editorial note by Professor Borchard in the July, 1928, number of this JOURNAL (page 614). Much can be said against the expediency or utility of an international conference at this time for the formulation of rules for the conduct of war, and the calling of such a conference on the heels of a great and solemn agreement among the nations to renounce war and to settle all their disputes, whatever their origin or character, by pacific methods would certainly be regarded by many as evidence of the insincerity of those who were parties to the agreement. But considering the turn which the question of the freedom of the seas has now taken, the importance which is attached to it in the United States and its bearing upon the problem of reduction of armaments, to say nothing of its effect upon the maintenance of friendly relations between Great Britain and the United States, and considering also the scepticism which large numbers of persons feel as to the effectiveness of the Kellogg Pact as a guarantee of peace in the future, the desirability of an agreement, whether reached through the instrumentality of an international conference or otherwise, can hardly be denied. This desirability is frankly recognized by English journals such as the *London Observer* and the *Manchester Guardian*, the latter of which in its issue of February 12, 1929, emphasized that it would remove the only possible cause of an armed conflict between Great Britain and the United States. The editor added that "it is hardly an exaggeration to say that world affairs reveal no problem of greater importance than the problem commonly known as the 'freedom of the seas.' Indeed—and this again is hardly an exaggeration—if Great Britain and the United States come to an agreement in which maritime law will have been revised, so that the principle of the freedom of the seas will be carried out, then the cause of universal peace will have been won, whereas, if they do not come to such an agreement this cause will have been lost."[1]

[1] Compare also the following from an article by Mr. J. L. Garvin in a recent issue of the *London Observer:* "Whatever government may be in power or office in this country three months hence, its first duty in world affairs will be to enter in conference with the United

Senator Borah's proposal for a conference did not indicate the specific terms of the agreement which in his opinion are essential to the principle of the freedom of the seas. Very properly, that is to be left to future discussion and the decision of the conference. Senator Walsh, however, expressed the opinion that it should include the immunity of private property from capture at sea. Some newspapers have even suggested that it should include the abolition of commercial blockades, "starvation" blockades, as they were characterized. But generally, the popular discussion has been vague, the demand being merely for recognition of the "freedom of the seas," a seductive phrase which is capable of being so interpreted as to deprive belligerents of all power of interference with neutral ships or commerce.

It may be assumed that the discussion will ultimately be concentrated on such matters as a more precise definition of contraband, the distinction between absolute and conditional contraband, the application of the doctrine of continuous voyage, the taking of neutral vessels into home ports and detaining them for search, and a host of questions relative to blockade. The fundamental question around which all others will converge will, of course, be the rights of neutrals. Shall they be extended or curtailed?

In this connection, a suggestion of Sir John Fischer Williams is worthy of consideration. It is that a distinction should be recognized between the rights of neutrals in what he denominates "public" wars, that is, wars carried on by or under the authority of a collective group of states, for example, the League of Nations, against an aggressor or for the protection of international covenants, and their rights during the existence of "private" wars, that is, wars begun and waged by individual states on their own account and for the advancement of purely national interests. The differentiation is somewhat analogous to the Grotian distinction between just and unjust wars, although a "private" war is not necessarily an unjust war. But in any case, Sir John argues, the rights of neutrals during wars falling within the first category should be restricted, on the principle that they may be assumed to be just wars from the point of view of the collective authority waging them, and neutrals should be willing to consent to larger restrictions on their rights in order to facilitate the success of the just belligerent. In the case of "private" wars, on the other hand, the rights of neutrals should be extended rather than curtailed, on the principle that the waging of wars of this kind should be made as difficult as possible, and that they should be permitted to interfere as little as possible with the ordinary peace time trade rights of other states.

Whatever may be the merits or demerits of this distinction, it would seem that some such principle is destined to find recognition in the new inter-

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States upon the future of sea-law. Settle that and peace will stand at last upon a practical basis, solid enough to ensure the real progress of disarmament and the end of the 'frantic finance' still devoted everywhere to the creation of improved killing machines."

national law. There can be no doubt that since the World War a new conception of neutrality has become widespread, and there will be a strong demand that any revision of maritime war law shall take account of it, at least to the extent of limiting the right of neutrals to furnish military supplies to an aggressor against whom measures of force or restraint in the nature of war are being applied by or under the authority of a collective group of Powers, whether it be the League of Nations or some other body. That the general principle at least will find support in the United States is evidenced by the popular sympathy which has been expressed for the Capper and other somewhat similar resolutions that have been introduced in Congress to prohibit American nationals from furnishing arms and munitions to an aggressor or to deny them the protection of the United States.

The future discussion of blockade, certainly the most grievous restriction on the freedom of the seas in time of war, is likely to be accompanied by proposals to abolish it outright. Heretofore, blockade has been regarded not only as an entirely legitimate and humane belligerent weapon, but one which no state possessing a powerful navy could think of surrendering. It was largely by means of it that the Civil War in the United States was won, and without recourse to it, and in the form in which the right of blockade was interpreted by the British Government, Germany would probably have been the victor in the World War. Considering, however, the probable increase in the efficiency of submarines and the rôle which aircraft is likely to play in the wars of the future, it is doubtful whether the right of blockade will be an advantage to Great Britain even with her powerful navy, or to other countries similarly circumstanced. A writer in the *Manchester Guardian* (issue of January 12), after adverting to the fact that with a few more submarines Germany would have succeeded in blockading the British Isles during the World War, expressed the opinion that in some future war an enemy having a large fleet of submarines of the high state of perfection which it may be assumed submarines will then possess (France for example), aided by aircraft, will find it a relatively easy task to blockade Great Britain, in spite of her own powerful navy. He concludes therefore that "blockade, our traditional weapon in war, has become far more dangerous to ourselves than to others; it follows that to abolish this weapon altogether would only be an advantage to Great Britain; indeed, more than this, it might be her and the Empire's salvation." The assumptions, he says, upon which the old argument for the retention of blockade as a belligerent weapon was based, namely that the Power which has the strongest fleet can blockade an enemy without itself being blockaded, are out of date, in view of the new conditions created by the submarine and the aëroplane. With blockade abolished and contraband limited in accordance with the old conception, the traditional American view, the danger of starvation due to Great Britain's insular position would disappear. But while acquiring this security, she would lose whatever advantage might be derived from the right to blockade her enemies, an ad-

vantage which, in view of the new conditions mentioned, would it is believed be more than counterbalanced by her own immunity against being blockaded.

Would the United States regard with favor a proposal to abolish commercial blockade? Her geographical situation is different from that of Great Britain. It would be difficult for a European enemy to blockade her distant and extensive coast-lines with submarines, but with a powerful navy she might herself blockade a European enemy, although the probability is likely to become less and less with the multiplication and perfection of submarines and aircraft, both of which can be employed as effective instruments for the dispersal of a blockading squadron. As a belligerent the United States might lose by the abolition of blockade, but as a neutral the advantage derived would be very large, since it would leave open American commerce with all belligerents, subject only to restrictions on the carriage of contraband. This advantage, it is believed, would much more than counterbalance the probable loss of the United States as a belligerent from the surrender of the right of blockade.

The Kellogg Pact would seem to afford the basis for a fair and just compromise between Great Britain and the United States relative to the blockade controversy. The United States, on its part, might agree to forbid its nationals from furnishing arms, munitions and other military supplies to an aggressor under the Covenant of the League who in nearly every conceivable case would at the same time be a violator of the Kellogg Pact, and against whom Britain is at war either on her own account or as the authorized agent of the League. The United States might go even further and adopt the same policy of benevolent neutrality or passive coöperation in respect to League measures of restraint against an aggressor, when such measures do not constitute a state of war: pacific blockade or an economic boycott, for example. In return for this negative assistance against an aggressor Great Britain might agree to surrender the right of blockade, which would be of no value to her except in the relatively few and probably unimportant wars waged by her outside the terms of the Kellogg Pact, and even in these wars it would probably amount to little. It is believed that the advantage to Great Britain resulting from the abolition of blockade and her consequent immunity from the danger of being herself blockaded by submarines and aircraft, and from the assurance that while the vast resources of the United States would be open to her they would not be at the disposal of an enemy against whom she was waging a defensive war, would more than offset her possible loss from the surrender of the right of blockade in any wars waged by her outside the scope of the Kellogg Pact.

Should Great Britain, however, insist on retaining the right of blockade, it seems likely that she will be obliged to consent to a modification of the interpretation and application which she made of it during the World War, and particularly the view that blockade may be legitimately employed to prevent overseas commerce with neutral ports, although they may be situated in such

close proximity to enemy territory that they may be used as conduit pipes for furnishing the enemy with supplies from abroad. Fair minded students must admit that much can be said in favor of the interpretation which Great Britain placed upon the right of blockade in the peculiar circumstances of the World War, but it was the subject of vigorous protest on the part of neutrals, and public sentiment in the United States is so strongly opposed to what was regarded as an unwarranted extension of the law of blockade, that there is little likelihood of its being accepted by the United States as a part of the new international law. Even without a powerful navy, the United States could probably enforce upon Great Britain its interpretation, by the threat of an embargo upon the shipment of supplies to Great Britain, since it is hardly probable that she could carry on for any great length of time an important war without drawing upon the vast resources of the United States. Under these circumstances, would it not be more advantageous to Great Britain, instead of insisting upon a view of blockade which she will probably not be able to enforce against the opposition of the United States, and therefore of being obliged to accept a form of blockade which, in case of war with a continental enemy circumstanced as Germany was during the World War, would be of little value to her, to consent to the total abolition of blockade, and thus secure immunity against the possibility of herself being blockaded by an enemy which she could not blockade effectively without blockading adjacent neutral ports?

Whatever may be the ultimate solution of this and other problems relative to the law of the sea in time of war, everyone will agree that the present chaotic state of the law is regrettable, if it does not constitute an actual danger to the peace of the world. It is believed that an acceptable agreement honorable to both Great Britain and the United States as well as the other maritime Powers concerned, is possible, if the problem is approached in the spirit of mutual give and take. Concession and compromise will be a necessary element of the task. Those who count upon being neutral in the important wars of the future would do well not to base their demands entirely on the absolute assumption of this happy contingency. In any case, neutrals will have to recognize that belligerents, and especially those which are engaged in defensive or other wars recognized as legitimate by international agreements, such as the Kellogg Pact, also have rights and that both alike will be obliged to accept limitations upon their freedom to use the seas during the existence of a state of war.

The whole problem of the revision of the law bristles with difficulties and it is one which requires the most careful and profound preliminary study by jurists and naval experts. To throw the problem into an international conference before this preparatory study has been made, as was done at the Second Hague Peace Conference, would in all probability lead to the same futile results.

J. W. GARNER.

THE NEW CITY OF THE VATICAN

Apart from its religious significance for large numbers of people in many lands, the treaty signed on February 11, 1929, by the representatives of Italy and of the Vatican creates a new international person and creates a technical, and possibly a practical, problem in diplomacy for most of the governments of the world. Incidentally it calls for the revision of a chapter or section in every recent text-book on international law.

Since the breach in the Porta Pia on September 20, 1870, and the annexation of Rome to the Kingdom of Italy, it has been a question with international writers whether the Papacy could any longer be counted among the states of international law. Could there be a state without territory? Could the Pope remain a sovereign merely by reason of the continuance of his spiritual jurisdiction after his temporal authority over a definite area of land had come to an end? It was quite clear that, in spite of the loss of temporal sovereignty, the Pope continued to exercise certain functions which were not only world-wide in scope but which involved direct diplomatic relationships with a number of governments. Could a legal character be attributed to these relationships in respect of international law? And if so, did such attribution tend to make the Papacy, as one of the parties, a person of international law?

The great majority of publicists agreed that upon the showing of facts the Papacy could not be regarded as possessing full legal international personality. Many went so far as to say that the Papacy had since 1870 lost all international character whatever. Notably was this the case with writers of the positive school whose determination of questions of international law was based upon the facts of international intercourse rather than upon abstract theories. In sharp contrast certain Latin writers saw in the minimum territory left to the Pope by the Law of Guarantees and in the world-wide spiritual authority exercised by the Pope over those professing the Roman Catholic religion a sufficient basis for a claim of sovereignty in the technical sense. The middle position was represented by Oppenheim who held that by custom, by tacit consent of the members of the family of nations, the Holy See had a "*quasi*-international" position, which did not however make it a subject of international law. Fauchille (elaborating Bonfils), while denying to the Papacy sovereignty in the ordinary sense of the word, recognized in it a "special," "particular" sovereignty, and consequently a juridical personality of its own, different from that of other states but nevertheless international in character.

The literature of the subject came to be extensive. Much of the discussion was academic, being the result of an attempt to explain a unique case which could not be fitted into any of the existing categories of international law. In some instances there was an obvious effort to claim for the Papacy a legal position which the writer believed a necessary or desirable buttress for its spiritual authority. But academic speculation and propaganda aside,

there still remained a *de facto* situation which had to be reckoned with. While Pius IX and his successors had consistently refused to accept the Law of Guarantees, as being a recognition of the legality of the annexation of the Papal States, they nevertheless continued to exercise the degree of sovereignty left to them under the law, so that, except for their refusal of the annual allowance provided for by the law, they conducted their régime in a way that did not differ substantially from the status attributed to them by the law.

The Law of Guarantees, May 13, 1871, declared the person of the Pope sacred and inviolable, although at the same time it subjected him to the Italian tribunals in respect to his civil obligations. Apart from that single item of Italian authority, the Pope enjoyed the honors of a sovereign, maintained an armed body-guard, carried on the functions of his office outside Italian jurisdiction, maintained his own post and telegraph service, and received and sent envoys from non-Catholic as well as Catholic states. The latter enjoyed in Italy the usual privileges and immunities accorded to diplomatic agents. The *de facto* status of sovereignty thus maintained by the Papacy, in spite of its refusal to accept the Law of Guarantees, was strikingly illustrated in 1916 when the Pope protested against the violation of his personal immunity in the confiscation by the Italian Government of the Palais de Venise, the seat of the Austrian legation at the Holy See.

In pursuance of the functions of his spiritual office, the Pope concluded from time to time with Catholic states agreements known as *concordats*. These agreements were in form treaties, but even before 1870 they had been concluded by the second parties not with the Pope as sovereign of the Papal States, but with the Pope as representative of the Roman Catholic Church. After 1870 they were entered into as before, without any reference to the changed status of the Holy See. The academic question whether concordats had the legal character of international treaties was discussed by publicists upon much the same basis that governed the discussion of the legal status of the Papacy itself, one group of writers holding that the agreements were no more than domestic legislation on the part of the states concluding them with the Holy See, another group maintaining that they were international treaties, although of a special class. The practical aspect of the question appeared when a state, such as France in 1905, abrogated a concordat by unilateral action, and protest against the act was made by the Pope on ground of a violation of international law.

The settlement of February 11, 1929, embodies three separate legal documents: a political agreement relative to the status of the Vatican as an independent state, designated the *Treaty of Conciliation* (Reconciliation!), a concordat between the new state and Italy relative to the relations between church and state, and a financial convention providing for an indemnity covering the loss of the temporal power in 1870. The first of the three documents marks, on the one hand, the abandonment by the Papacy of the terri-

torial claims underlying its passive resistance to the act of annexation in 1870 and, on the other hand, the acceptance by the Italian Government of the principle of Papal sovereignty as distinct from the privileged position short of sovereignty accorded to the Pope under the Law of Guarantees. It is composed of a preamble and twenty-seven articles, and, according to the official *communiqué*, begins by reaffirming the principle contained in the first article of the Constitution of Italy by which the Catholic Apostolic Roman religion is the only state religion in Italy. Next there is created the "City of the Vatican," the boundaries of which are indicated on a map annexed to the treaty, containing some 106 acres, over which the Holy See is recognized as having full property and exclusive dominion and sovereign jurisdiction, the Italian Government explicitly agreeing not to interfere in it, except to the extent of police control over St. Peter's Square, which is to be open to the public. The Italian Government is to furnish the connecting links by which the telephone, telegraph, wireless broadcasting and postal services of the Vatican are to be maintained with other states. The immunities attaching to persons residing within the Vatican City are extended to high officials outside the Vatican City, as well as to the edifices outside the city in which administrative services of the Vatican are conducted. The right to send and receive diplomatic envoys is recognized and their immunity provided for. The Vatican authorities will extradite fugitive criminals to Italy without awaiting formal requests for such action, but the Italian Government will undertake itself to punish offenses committed within the Vatican City. The Vatican will thus be saved the necessity of maintaining criminal courts.

Of particular importance to the future status of the Vatican City as an international person is the statement on the part of the Vatican that it wishes to remain, and will remain, outside the temporal rivalries of other states and therefore outside the international congresses convened for such purposes, except in a case where the parties to a conflict unanimously appeal to its mission of peace. In consequence, the territory of the Vatican City is to be neutral and inviolable.

The treaty concludes with a statement that it is to be considered as a definite settlement of the "Roman question" and that the Holy See by its present action "recognizes" the Kingdom of Italy with Rome as its capital, Italy on its side recognizing the sovereignty and independence of the Vatican City. The Law of Guarantees, and any other law contrary to the treaty, is hereby abrogated.

The apparent inference to be drawn from the neutrality clauses of the treaty is that the Vatican intends neither to ask admission into the League of Nations nor to accept an invitation from the League should one by courtesy be extended. The field of the League's activities is the political, economic and social interests of the nations. The field of the Vatican, with its reduced territory, is now to be purely "spiritual," that is, confined to the

religious interests of its church membership and to the general moral interests of mankind. That the two fields of activity cannot be separated by any sharp line of cleavage is obvious. Life is not so partitioned into categories that politics in the larger sense can ever be considered apart from the social ideal to which all law is directed. It would seem, however, that it is the desire of the Vatican not to participate in the deliberations of congresses or in the machinery of international administration, where states act in their corporate capacity, but to exert its moral influence primarily in respect to the individuals who within the boundaries of their respective states acknowledge its spiritual authority.

The two other legal documents involved in the settlement lie outside the field of international law in the strict sense. The first, a concordat, regulates the relations between the Vatican and the Italian Government and brings the civil law into harmony with the canon law—a purely domestic question for Italy, whatever general interest other nations may take in the policy of the new union of church and state. The second, a financial convention, is supplementary to the Treaty of Conciliation and places at the disposal of the Vatican a sum, partly in cash and partly in state bonds, in lieu of the allowance made to the Pope by the Law of Guarantees but never accepted by him.

Technically speaking, a new state now enters the family of nations and, diminutive though it be, takes its place beside the other independent sovereignties which are the subjects of international law. Henceforth international law must take account of the new state as a legal entity, even if it be absent from the councils of the nations and take no part in the adjustment of economic interests or political conflicts. If by a legal fiction the years between 1870 and 1929, as previously the years between 1798 and 1814, be regarded as a period of military occupation by a conquering army, the City of the Vatican becomes the successor in law of the Papal States and enters upon its eleven hundred and seventy-third year.

C. G. Fenwick.

THE INTERPRETATION OF THE GENERAL PACT FOR THE RENUNCIATION OF WAR

When the United States Senate on January 15, 1929, ratified the General Pact for the Renunciation of War, the Department of State notified the other nations of the world that it had been ratified "without reservations or conditions." The report of the Senate Committee on Foreign Relations recommending its ratification stated that it was made "solely for the purpose of putting upon record what your Committee understands to be the true interpretation of the treaty, and not in any sense for the purpose or with the design of modifying or changing the treaty in any way or effectuating a reservation or reservations to the same."

Throughout the entire discussion of the treaty, Secretary Kellogg and Senator Borah, as official spokesmen for the Administration in the Senate,

endeavored to maintain that the text of the Pact remained intact and unmodified by any interpretations placed on it by other governments. To accomplish this end they accepted completely these interpretations as being in entire harmony with the meaning of that instrument, and therefore as constituting no limitations or modifications. They regarded the extensive and prolonged preliminary negotiations in the light of mere discussions to remove any apprehensions concerning the import of the treaty. The text of the treaty was held to embody the full intention of the negotiators. To illustrate concretely how this end was attained, Secretary Kellogg conceded unequivocally the right of nations to wage war in self-defence, though he did not attempt to define what constituted self-defence. And Senator Borah in the course of the debate on the treaty in the Senate went so far as to maintain that the Spanish-American War was one of self-defence, and furthermore, that every nation reserved the right to employ force to protect its nationals when their lives might be endangered in foreign lands.[1] It needs no argument to show that an interpretation of this nature that converts a treaty for the renunciation of war into a sweeping recognition of an undefined right of self-defence is of immense significance.

The question arises whether the failure to embody in formal reservations this and other interpretations of the treaty by the negotiators deprives them of legal significance. The reasoning whereby Secretary Kellogg and Senator Borah reached the conclusion that no reservations or conditions were attached to the treaty and that the bare text of that instrument completely embodies the intent of the negotiators, is excessively simple though novel from the standpoint of international law. It is in substance that the interpretations contained in the preliminary negotiations which they have accepted are the correct interpretations and that no further interpretations are necessary or permissible! One is reminded of the dialogue between President Wilson and Senator Brandegee concerning the interpretation of the Versailles Treaty, when the former observed "the plain wording of the treaty will have a great deal to do, and the meaning of the wording is plain," and the latter rejoined: "That is simply another way of stating, is it not, that you are clear in your opinion that the provisions of the treaty are plain." (Conference held at White House on August 19, 1919).

While great deference is due to the interpretations placed by Secretary Kellogg and Senator Borah on the treaty, it is also necessary to show deference to the interpretations of Great Britain, France and other signatories of the General Pact for the Renunciation of War. For example, Sir Austen Chamberlain in his note of July 18, 1928, uses the following language:

> As regards the passage in my note of the 19th May relating to certain regions of which the welfare and integrity constitute a special and vital interest for our peace and safety, I need only repeat that His Majesty's Government in Great Britain accept the new treaty *upon the under-*

[1] Congressional Record, 70th Cong., 2d sess., pp. 1273 and 1286.

> *standing* that it does not prejudice their freedom of action in this respect. (Italics not in original.)

M. Briand in his note of July 14, 1928, employs these phrases:

> The Government of the Republic is happy, moreover, to *take note of the interpretations which the Government of the United States gives to the new treaty with a view to satisfying the various observations which have been formulated from the French point of view. . . . In this situation and under these conditions,* the Government of the Republic is happy to be able to declare to the Government of the United States that *it is now entirely disposed to sign the treaty. . . .*

Baron Tanaka, in his note of July 20, 1928, says that the Japanese Government has "substantially" the same "understanding" of the treaty as that entertained by the United States. M. Beneš, in assenting to the treaty in his note of July 20, 1928, uses the phrase "*In accordance with the negotiations prior to the signing of the treaty.*" The German Government states in its note of July 11, 1928 that "*it takes cognizance of the statements* made by the Government of the United States of America contained in your excellency's note of June 23, that it *agrees to the interpretation* which is given therein to the provisions of the proposed pact, and that it *is accordingly ready to sign this pact in the form now proposed.*" M. Hymans, of Belgium, in his note of July 17, 1928 says: "This Government *notes with satisfaction the explanations and interpretations* contained in your excellency's letter." And Secretary Kellogg in his note of June 23, 1928, addressed to the governments invited to sign the treaty, after embodying his own "*construction*" of the treaty with reference to the six major "*considerations*" emphasized by France, states: "*In these circumstances* I have the honor to transmit herewith for the consideration of your excellency's government a draft of a multilateral treaty for the renunciation of war containing the changes outlined above."

From the foregoing it would seem beyond doubt or cavil that this treaty was accepted and signed only after the most thorough discussion of its implications, and after the apprehensions and objections of the different negotiators were fully satisfied. Each nation, with the exception of the United States, candidly and explicitly placed on record its own "interpretations," "understandings," "precisions," and "constructions" which conditioned its acceptance of the Pact. There is no reason to believe that the treaty would ever have been signed had it not been for all that was recorded in the preliminary correspondence and which, through the wise foresight of Great Britain, was formally deposited with the League of Nations. It would therefore seem futile for Secretary Kellogg and Senator Borah to treat this correspondence as *nul et non avenu.* Its importance is unquestionable. The only point that remains to be considered is its precise legal signification.

There is no doubt that Secretary Kellogg was right in stating that the Senate ratified the Pact without reservations or qualifications of a formal nature. It would seem, however, that he did not realize the legal signifi-

cance of the report of the Senate Committee on Foreign Relations which purported to place on record its understanding of "the true interpretation of the treaty." Nor does he appear to have appreciated the full significance of the *interpretations* recorded in the official correspondence setting forth the precise conditions under which the treaty was negotiated, accepted, signed, and ratified. These interpretations, notably the extraordinary declarations by Sir Austen Chamberlain concerning British policy, may have quite the same legal effect as if they were attached as formal reservations to the treaty when ratified. As a matter of fact it has become a universally accepted practice for nations to attach to the ratification of multilateral pacts specific reservations, often of a most important character, which affect their obligations, without in the least affecting the treaty as a whole. Examples of this are to be found in the conventions signed at the Hague Conferences of 1899 and 1907, as well as the Inter-American Conventions on Arbitration and Conciliation signed in Washington on January 5, 1929. If it were not for this procedure it would be most difficult, as Fauchille points out[2] for nations ever to come to an agreement concerning a multilateral treaty affecting a diversity of interests and obligations. The preferable procedure would appear to be that of embodying in the preliminary negotiations, either in a protocol *en règle*, or in an exchange of correspondence, as in the case of the treaty now under discussion, the respective understandings and commitments of the various signatories. And it is of especial interest, as proof of the importance of these preliminary negotiations, that the Government of Russia, in ratifying the General Pact for the Renunciation of War, expressly refused to accept the British interpretation of its commitments under this treaty. The Egyptian, Turkish, and Persian Governments also declared that they could not be bound by the reservations of the other parties.

There would seem no reason to question that in actual practice the greatest importance must be attached to all international negotiations leading up to the signing of a solemn treaty. "The important point," as Westlake observes in discussing the interpretation of treaties, "is to get at the real intention of the parties."[3] International compacts are never to be interpreted in a narrow technical manner, as a bond in private law, but in a liberal, generous spirit that seeks to understand and respect the intent and the understandings of the negotiators. Calvo has admirably summed up the rule of interpretation of treaties:

> On peut encore, pour arriver à la conciliation [*in case of disagreement concerning interpretation*], rechercher les faits, les circonstances qui ont précédé immédiatement la signature de l'accord, examiner les protocoles, les procès-verbaux ou les autres écrits dressés par les négociateurs, étudier les mobiles ou les causes qui ont provoqué le traité, en un mot la raison d'être de l'acte, comparer les textes à interpréter à d'autres

[2] Traité de Droit International Public, sec. 823 (1).

[3] International Law, Vol. I, p. 282.

> traités antérieurs, postérieurs ou contemporains, qui ont été conclus par les mêmes parties sur des matières analogues.[4]

Ralston, in his authoritative work *The Law and Procedure of International Tribunals*, states:

> The events leading up to the signing of a treaty are often referred to as explanatory of the intention of the parties entering into the treaty and so of prime importance in determining their intention. Thus in the Fisheries case between the United States and Great Britain it was remarked: "Considering that the evidence seems to show that the intention of the Parties to the Treaty of 1818, as indicated by the records of the negotiations and by the subsequent attitude of the Governments was to admit the United States to such fishery, this Tribunal is of opinion that it is incumbent on Great Britain to produce satisfactory proof that the United States are not so entitled under the treaty."[5]

No rule of international law would seem more firmly established than this rule of the interpretation of treaties in the light of the intent of the negotiators. That intent, naturally is assumed to be stated in the text of the treaty itself, but it also may be sought elsewhere, either in specific reservations attached to treaties at the time of signature or ratification, or in interpretations, clarifications, understandings, constructions, qualifications or actual conditions set forth during the negotiations prior to the ratification. Hence it is to be expected that in any future divergence of opinions concerning the nature of the obligations assumed under the General Pact for the Renunciation of War recourse must necessarily be had, not only to the official correspondence of the negotiations, but to various official utterances of such government spokesmen as Sir Austen Chamberlain, M. Briand, Secretary Kellogg, and Senator Borah. Their interpretations of this instrument will be entitled to the closest scrutiny and respect. So far as the commitments of the United States are concerned, the report of the Senate Committee on Foreign Relations giving its understanding of the "true interpretation" of the Pact conditioning the American ratification must also be taken into account, whether by a judicial tribunal, or by international public opinion.

In conclusion, it should be observed that while the moral element in international law is ever of supreme importance by reason of its fundamental basis in the common consent of equal nations, and in their good faith, it is of peculiar significance when applied to a treaty which announces the high intent of nations to settle their disputes by peaceful means rather than by war. The *intent* of the General Pact for the Renunciation of War is everything. To make certain of the intent of every signatory to that Pact; to hold every signatory to the strict fulfillment of its commitments under that Pact, it would appear good sense and good ethics, as well as good law, to give due weight and credit to the interpretations placed on this momentous declaration by every signatory prior to ratification. Any other procedure would

[4] *Dictionnaire de Diplomatie et de Droit International.*

[5] Sec. 26, p. 18.

seem not only contrary to good sense, good ethics, and good law, but contrary to the interests of international harmony and justice. It would convert an instrument of peace into an instrument of discord.

PHILIP MARSHALL BROWN

THE PORTER AND CAPPER RESOLUTIONS AGAINST TRAFFIC IN ARMS

On February 11, 1929, Mr. Porter, Chairman of the Foreign Affairs Committee of the House, and Senator Capper, a member of the Foreign Relations Committee of the Senate, introduced into the House and Senate respectively a joint resolution providing for the stoppage of the exportation of arms and munitions in time of war. Neither of these resolutions was passed before the adjournment of Congress. The Porter resolution amends the joint resolution of January 21, 1922, to read as follows:

> That whenever the President finds that in any country conditions of domestic violence or of international conflict exist or are threatened, which are or may be promoted by the use of arms or munitions of war procured from the United States, and makes proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President prescribes, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

The Porter resolution is the same as the resolution of 1922 except in the first clause, which in the latter resolution reads as follows:

> That whenever the President finds that in any American country or in any country in which the United States exercises extraterritorial jurisdiction conditions of domestic violence exist, which are or may be promoted, etc.

It is apparent that while the resolution of 1922 restricts the shipment of munitions (1) to any American country or any country in which the United States exercises extraterritorial jurisdiction (2) torn by domestic violence, the Porter resolution proposes to extend the restriction (1) to any country of the world (2) in which domestic violence or international conflict exists or impends. The Porter resolution, therefore, appears in these respects to be similar to the Burton resolution which was introduced in the House last year and which was commented upon editorially in the July, 1928, number of this JOURNAL (page 610), where the history and law of contraband trade is briefly reviewed.

The Porter resolution, as we have seen, becomes operative upon a finding by the President of the fact that domestic violence or international conflict in any country is or may be promoted by arms or munitions of war procured from the United States. The Capper resolution proceeds upon an entirely different finding of fact, namely, whether any country has violated the

multilateral treaty for the renunciation of war. The pertinent provisions of the Capper resolution are the following:

> That whenever the President determines and by proclamation declares that any country has violated the multilateral treaty for the renunciation of war, it shall be unlawful, unless otherwise provided by Act of Congress or by proclamation of the President, to export to such country arms, munitions, implements of war, or other articles for use in war until the President shall by proclamation declare that such violation no longer continues.
>
> * * * * *
>
> Sec. 3. The President is hereby requested to enter into negotiations with other governments which ratify or adhere to the said treaty to secure agreement that the nationals of the contracting governments should not be protected by their governments in giving aid and comfort to a nation which has committed a breach of the said treaty.
>
> Sec. 4. The policy of the United States as expressed in section 2 hereof shall apply only in case of a breach of the said treaty by war against a government which has declared its adherence to a similar policy.

This makes it necessary to examine briefly how the treaty renouncing war may be violated. This treaty, as succinctly stated by Secretary Kellogg, had for its object "condemning war and renouncing it as an instrument of national policy in favor of the pacific settlement of international disputes."[1]

He later stated that—

> All war is an assault upon the stability of human society, and should be suppressed in the common interest. The Government of the United States desires to see the institution of war abolished, and stands ready to conclude . . . a multilateral treaty . . . binding the parties thereto not to resort to war with one another. The precise language to be employed . . . is a matter of indifference to the United States so long as it clearly and unmistakably sets forth the determination of the parties to abolish war among themselves.[2]

Mr. Kellogg was "looking to the conclusion of an appropriate multilateral treaty proscribing recourse to war."[2] These sentiments were reiterated by Mr. Kellogg in his notes of April 13, 1928, to Great Britain, Germany, Italy and Japan, in which he held that participation in the proposed treaty was "an unqualified renunciation of war."

From the diplomatic correspondence so far published and from the public statements of Secretary Kellogg, the following would appear as his interpretations of the treaty—

(1) That the anti-war treaty does not "restrict or impair in any way the right of self-defense" which is "inherent in every sovereign state and is implicit in every treaty", and "it alone is competent to decide whether circumstances require recourse to war in self-defense";

[1] Mr. Kellogg to French Ambassador, December 28, 1927.
[2] Mr. Kellogg to French Ambassador, February 27, 1928.

(2) That "a violation of the multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state"; the benefits of the treaty fall as to that state;
(3) That there is "no necessary inconsistency between the Covenant [of the League of Nations, which "imposes no affirmative primary obligation to go to war"] and the idea of an unqualified renunciation of war";
(4) That "if all the parties to the Locarno Treaties become parties to the multilateral anti-war treaty . . . , there would be a double assurance that the Locarno Treaties would not be violated by recourse to arms";
(5) That if all the parties to treaties of neutralization became parties to the multilateral anti-war treaty, they "would completely safeguard their rights since subsequent resort to war by any of them or by any party to the anti-war treaty would violate the latter treaty as well as the neutrality treaty."

Great Britain (India and New Zealand concurring) added an additional interpretation of the treaty, to wit:

> There are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defense. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.

This interpretation occurs in Mr. Chamberlain's note of May 19, 1928, and was reiterated in his note of July 18, 1928. Mr. Kellogg, however, appears never to have specifically referred to or accepted this interpretation in the diplomatic correspondence preceding the signature of the treaty.

It was upon the basis of a formal acceptance in diplomatic notes of the interpretations of the treaty made by Secretary Kellogg that the great Powers and some of the small ones, as original signatories, accepted and signed the anti-war treaty. It is evident from the language used by these Powers in accepting the anti-war treaty that they did so on the footing of Mr. Kellogg's interpretations of the treaty, and that Great Britain did so on the further understanding that the anti-war treaty did not affect her vital interests in "certain regions." Nevertheless, Mr. Kellogg later said in the Senate hearings: "There is absolutely nothing in the notes of the various governments which would change this treaty, if the treaty had been laid on the table and signed as it is without any discussion." In short, it appears to have been Mr. Kellogg's belief that the treaty as signed included all of the understandings of the Powers as expressed in the diplomatic correspondence, and this was apparently the belief of the other signatories.

As about 58 countries, including all of the Locarno signatories and apparently all of the League members, have signed, adhered, or expressed an

intention to adhere to the treaty, any question as to going to war under the League Covenant or Locarno Treaties would seem to come down to a question of self-defense, for self-defense is the only exception to the renunciation of war.

Sifting out further the meaning of the treaty, it may be said, as Mr. Kellogg indicated at the hearings, that it contains no affirmative obligation and is purely negative in its purpose and that no obligation exists to go to war with a violator of the pact. There are no sanctions, no elements of force back of the treaty. It rests upon good will and the conscience and honor of governments and peoples. In short, it is a self-denying declaration not to resort to war except in self-defense.

Self-defense is a broad and vague term which, as Mr. Kellogg interpreted it at the hearings, "covers all our possessions, all our rights; the right to take such steps as will prevent danger to the United States." A violation of the treaty, therefore, would seem to be a question of whether a belligerent has acted in self-defense or not. But query, whether self-defense is not limited by Article 2 of the anti-war treaty, which provides in effect that no solution of a dispute or conflict shall be sought except by pacific means. Does this mean that a war in self-defense is not proper until all pacific means of settlement have been exhausted in vain? Many think Article 2 is the heart of the treaty, the touchstone of its meaning. At any rate it is a distinct and positive pledge for the settlement of disputes by pacific means rather than by war.[3]

This brief analysis of the anti-war treaty is not made in any critical or unsympathetic mood. It undoubtedly marks a great advance in the cause of international peace by crystallizing world thought on the subject, if for no other reason. Analysis at best is a devitalizing process, but, it seems necessary in order to study the bearing of the two resolutions under discussion, which seem, in the public mind, to have for their object the providing of sanctions for the Kellogg treaty.

The Porter resolution, as we have seen, has no direct relation to the anti-war treaty, but in determining whether conditions of domestic violence or international conflict are or may be promoted by munitions procured from the United States, the President might, or might not, cut off supplies for the violator of the anti-war treaty without determining the question of aggression. Or the President might apply the resolution to both belligerents alike without taking the side of either. The latitude of action is much broader than that allowed the President under the Capper resolution.

The Capper resolution is premised upon the President's finding that "any

[3] If Japan procures a naval base in Mexico, or if Mexico declines to settle American claims, these controversies must be settled by pacific methods, if possible. If this is not possible, if controversies drag along unsettled, if nations are unable to maintain peace with justice and dignity under Article 2, then the peace pact will become a scrap of paper and the reign of war will return.

country has violated the multilateral treaty for the renunciation of war." The resolution, therefore, puts responsibility squarely on the President to determine whether the Kellogg Pact has been violated by one of the belligerents, that is, which one has not acted in self-defense within the meaning of the treaty. It is conceivable that his decision might disagree with the decision of the League in the application of the economic measures provided for in the Covenant. No President, it is submitted, would wish to assume the unusual and delicate responsibility of determining the aggressor state in an international conflict and depriving that state of arms. Such action would reject the non-coercive idea of the Kellogg Pact and substitute that of punitive sanctions. It also would take the President into the hazy realms of "aggressive war" or "self-defense," which terms Mr. Kellogg regarded as impossible of satisfactory definition, and within the competence of each state to determine for itself. In fact the diplomatic correspondence referred to would seem to preclude the execution of the resolution proposed by Senator Capper.

L. H. WOOLSEY.

WAR CLAIMS SETTLEMENTS

One of the major problems of post-war adjustments has been the settlement of the pecuniary claims, which arose out of the World War, on behalf of the United States and its nationals and also against the United States covering both the period of its neutrality and after it became a belligerent. These claims may conveniently be classified in three general groups as follows: (1) Claims between the United States and the Allied Powers and neutral Powers and their respective nationals. The claims in this group are based upon and governed by principles of international law. (2) Claims against the enemy Powers and their nationals. The claims in this group are based upon and governed by treaty stipulations. (3) Claims against the United States on behalf of the nationals of enemy Powers. The claims in this group are based upon and governed by obligations voluntarily assumed by the United States under the Settlement of War Claims Act of 1928.

An adequate discussion of the character of the claims included in each of these groups and of the issues involved and the manner of settlement would in itself fill a separate volume, and it is not the purpose of the present editorial comment to go further than merely indicate generally the results already accomplished in arranging for and carrying out the settlement of these claims.

Group (1). Claims Based Upon and Governed by Principles of International Law.

During the period of the neutrality of the United States a great number and variety of war claims arose between Great Britain and the United

States, involving chiefly questions concerning the conflict between rights asserted under international law by belligerents, on the one hand, and neutrals on the other, all of which claims, with the exception of a few special cases which were promptly adjusted by agreement for reasons of policy, were reserved by mutual consent for consideration and adjustment at the end of the war. The same situation developed as to war claims between the United States and France.

After the United States entered the war on the side of the Allied Powers, it sanctioned by acquiescence many of the practices which the Allied Powers had adopted toward the commerce and interests of the United States when neutral. This attitude on the part of the United States was equivalent, or would naturally have been considered in an international arbitration as equivalent, to the abandonment of a large percentage of the claims which the United States, as a neutral, had asserted against Great Britain and France. The rest of these claims between the United States and Great Britain were voluntarily abandoned, as a matter of policy, by a reciprocal agreement effected by an exchange of notes between those governments on May 19, 1927.[1] This agreement provided in paragraph (2) of Article I "that neither will present any diplomatic claims or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be regarded as the final settlement of such claim, it being understood that each government will use its best endeavors to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British prize courts shall remain open to claimants subject to the right of the British authorities to plead any defences that may be legally open to them."

It was further provided in paragraph (3) of Article I of this agreement that the provisions of paragraph (2) were without prejudice to the right of each government to maintain thereafter such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims covered by paragraph (2). In Article II of this agreement certain exceptions were made which are not of importance in the present connection.

After the United States entered the war several important claims against the United States arose on behalf of Dutch nationals on account of the requisition by the United States of a number of Dutch merchant ships found in American ports, and also several claims arose on behalf of Norwegian nationals through the frustration, by war legislation in the United States, of contracts acquired by them for the construction of merchant vessels in the

[1] See editorial comment in this JOURNAL, Vol. 21, p. 764.

United States. The Dutch claims were adjusted by agreement [2] under which the vessels then held by the United States were returned to the owners, and compensation for their use and for the value of several which were lost was paid to the parties entitled thereto in accordance with the presidential proclamation of March 20, 1918. The Norwegian claims were settled by the payment of an award rendered as the result of the reference of this question to an international tribunal in the form of an arbitration proceeding.[3]

Group (2). Claims Based Upon and Governed by Treaty Stipulations.

Claims against Germany and claims against Austria and Hungary and their respective nationals have been dealt with through two claims commissions with authority to determine the financial obligations, respectively, of Germany and Austria and Hungary on account of American claims against them and their nationals in accordance with their peace treaties with the United States, which peace treaties are, respectively, the Treaty of Berlin, signed August 25, 1921, the Treaty of Vienna, signed August 24, 1921, and the Treaty of Budapest, signed August 29, 1921.[4]

(a) Claims Against Germany.

The obligations of Germany under the Treaty of Berlin, in which was incorporated certain selected provisions of the Treaty of Versailles, were dealt with by the Mixed Claims Commission, United States and Germany,[5] established under the Agreement of August 10, 1922,[6] between those governments. Upwards of 12,400 claims for alleged damages to the Government of the United States and to its nationals, approximating $1,480,000,000 in amount, were filed with this commission. These claims on revision were reduced to approximately 8,500 docketed cases, many of which included a number of different items of damage arising from different causes. Of these docketed cases about 5,200 have been dismissed by this commission either for lack of jurisdiction under the treaty or for failure to prove the damages alleged. In about 3,100 docketed cases awards have been made by this commission, and there now remain undisposed of only 160 cases, a few of which have been and all of which will soon be finally submitted to the commission for decision. The awards rendered by this commission represent in the aggregate about $154,465,000, together with interest thereon amounting to approximately $68,000,000. Practically all of the awards immediately payable under the Settlement of War Claims Act of 1928 (on account

[2] Third Annual Report, United States Shipping Board, p. 21.

[3] See editorial comment, this JOURNAL, Vol. 17, p. 287.

[4] This JOURNAL, Vol. 16, Supplement, pp. 1, 10, 13.

[5] German Commissioner, Dr. Wilhelm Kiesselbach, Chief Justice of the Hanseatic Supreme Court; American Commissioner, Chandler P. Anderson, formerly Arbitrator on the Anglo-American Claims Arbitration Tribunal; Umpire, Hon. Edwin B. Parker, also Sole Commissioner of the Tripartite Claims Commission, United States, Austria, and Hungary, and War Claims Arbiter under the Settlement of War Claims Act of 1928.

[6] *Ibid.*, p. 171.

of death or personal injury or other awards under $100,000) have been paid in full, and in the remainder (awards exceeding $100,000) claimants have received $100,000 on account in each case and will receive on account from time to time the further amounts available under the Act which within a few years will pay them in full.

In dealing with these claims the commission adopted the policy of classifying them in separate groups presenting different questions of law affecting the liability of Germany and the jurisdiction of the commission under the Treaty of Berlin, and the commission then proceeded to render administrative and jurisdictional opinions dealing with the legal questions presented by the claims in these respective groups. These questions and principles of liability having thus been determined, it only remained to apply the rulings of the commission to the facts presented by the individual cases, and in the great majority of these cases the Agents of the two governments were able to submit to the commission an agreed statement of facts, while in about 2,500 cases they also included a recommendation as to the amount of damages resulting from the facts so agreed upon, thus greatly facilitating the work of the commission in fixing the amount of the award. This method of dealing with these claims accounts in a large measure for the unprecedented rapidity with which this commission within five years has been able to dispose of the enormous mass of claims which have been submitted to it for decision.[7]

In addition to the claims originally filed with this commission, the Governments of the United States and Germany, by an agreement entered into on December 31, 1928,[8] have now authorized the submission to this commission for decision of 7,300 more claims against Germany for damages arising out of the war, which claims had not been filed as original claims within the time limit fixed for their presentation under the agreement of August 10, 1922, establishing this commission and fixing its jurisdiction.

Of this new group of claims approximately 2,000 have already been dismissed by the commission on jurisdictional grounds, and awards based on agreed statements of fact have been entered in about 100 others. Substantially all of the questions of law affecting Germany's financial obligations on account of these claims under the Treaty of Berlin have already been decided by the commission in dealing with the claims originally filed, so that after the facts in these belated claims are ascertained the claims can readily be disposed of by the application of the rulings of the commission in its earlier decisions in similar cases or groups of cases. For this reason and also because by the terms of the agreement, permitting the submission of these belated claims, time limits are set for their presentation, it is anticipated that the commission will be able to deal with the great majority of them

[7] See Rules of Procedure of Mixed Claims Commission, this JOURNAL, Supplement, Vol. 17, p. 133; also subsequent amendments.

[8] This JOURNAL, Vol. 23, p. 159.

during the current year and that all of them will be disposed of before the end of another year.

(b) Claims Against Austria and Hungary.

The obligations of the Austrian and the Hungarian Governments under their respective peace treaties with the United States were dealt with by the Tripartite Claims Commission,[9] established by the United States, Austria and Hungary under their agreement of November 26, 1924.[10]

Sixteen hundred and thirty-one claims have been filed against Austria and Hungary, aggregating in amount upwards of $41,000,000, of which it is estimated that approximately two-thirds were against Austria and one-third against Hungary. It has been impracticable to fix the exact figures demanded, or even to closely approximate them, because many claims were withdrawn, abandoned, dismissed for lack of prosecution, or modified, and in some cases it was not clear whether the respondent was Austria or Hungary, or both, and the question of valorization in American money and allowance of interest presented a variety of problems which could only be settled when claims and supporting evidence were submitted, and also in many cases the amount of damages claimed was not stated.

Of the claims thus filed, about 1,000 have been dismissed and about 150 have been withdrawn, and awards have been made against Austria amounting in the aggregate to approximately $350,000. There are only five remaining claims against Austria, which are waiting final decision, and they are expected to be disposed of within the next two months.

Austria has deposited with the United States Treasury a fund sufficient to pay all awards for which Austria is responsible, and they are being paid under the authority of the Settlement of War Claims Act of 1928.

The awards against Hungary are fewer and smaller than against Austria, but as yet Hungary has not arranged for a deposit with the Treasury for their payment because of a complication as to the method of payment under the Settlement of War Claims Act of 1928, owing to some differences between the Austrian and the Hungarian situation.

Group (3). Claims Based Upon and Governed by Obligations Voluntarily Assumed by the United States Under the Settlement of War Claims Act of 1928.

In the Act of Congress approved March 10, 1928, known as the Settlement of War Claims Act of 1928,[11] provision was made for the ascertainment and payment of the claims of German and Austrian and Hungarian nationals against the United States arising out of the taking over by the United States, under war legislation, of vessels, a radio station in the United

[9] Sole Commissioner, Hon. Edwin B. Parker.

[10] This JOURNAL, Supplement, Vol. 20, p. 51. For Rules of Commission regulating practice and procedure, see this JOURNAL, Supplement, Vol. 21, p. 119.

[11] This JOURNAL, Supplement, Vol. 22, p. 40.

States, and patents and the use of inventions belonging to the nationals of the countries above mentioned.

Section 3 of this Act provided for the appointment by the United States of a War Claims Arbiter [12] to hear the aforesaid claims and make awards for the fair compensation to be paid by the United States on account thereof. Rules of compensation are prescribed with the view of giving claimants the fair value of their property. The Act provided as to compensation for vessels that "Such compensation shall be the fair value, as nearly as may be determined, of such vessel to the owner immediately prior to the time exclusive possession was taken under the authority of such Joint Resolution [Resolution of May 12, 1917, 40 Statutes at Large, p. 75], and in its condition at such time, taking into consideration the fact that such owner could not use or permit the use of such vessel, or charter or sell or otherwise dispose of such vessel for use or delivery, prior to the termination of the war, and that the war was not terminated until July 2, 1921, except that there shall be deducted from such value any consideration paid for such vessel by the United States." (Section 3 (b) (1).)

In the report of the Senate Committee on Finance recommending this Act, the following explanation as to this rule of compensation is found:

> In the case of the ships, for example, the board of survey appointed by the Secretary of the Navy under the joint resolution [authorizing the taking of these vessels] fixed an aggregate value of approximately $34,000,000 for all the vessels. In a suit against the United States the owners of the vessels claimed their value to be over $230,000,000. It is probable that the value to the owners was considerably less than the latter sum and possibly more than the former. The rule prescribed in the bill is intended to approximate the price which a willing purchaser would pay for the vessel immediately prior to the time possession was taken by the United States, realizing that the ship could not be delivered until after the termination of the war and that the war would not terminate before July 2, 1921.

This report further states:

> In the first place the bill applies only to "merchant" ships. It is reported that at least four of the ships were naval ships, and these would be excluded. Furthermore, if any of the ships were used as naval ships, even though otherwise within the merchant class, no compensation would be paid for them. The rule of value prescribed also requires that the arbiter make proper allowances for the condition of the ship at the time the United States took possession of it. Accordingly, all the damages as a result of acts of sabotage by the crews will be taken into consideration and the necessary deductions from the value of the ship made.

As to radio stations it is explained in the report of the Senate Committee that the Act provides for compensation by the United States on account of only one station, namely, the Sayville station, which was owned by a New

[12] War Claims Arbiter, Hon. Edwin B. Parker.

York corporation, the stock of which was beneficially owned by enemies. "The station was leased to the United States Government in 1915 and was being operated by the Navy Department in 1917. The Alien Property Custodian seized all the stock of the New York corporation and installed directors and managed the corporation. The corporation as reorganized by the Alien Property Custodian sold the station to the United States Government and the corporation was thereafter dissolved. The consideration paid by the United States (approximately $45,000 for the plant) was paid to the Alien Property Custodian." This Act proposes to determine the compensation which should have been paid by the United States for this station.

The rule laid down in the Act for determining the compensation for this radio station is that "Such compensation shall be the fair value, as nearly as may be determined, which such radio station would have had on July 2, 1921, if returned to the owner on such date in the same condition as on the date on which it was seized by or on behalf of the United States, or on which it was conveyed or delivered to, or seized by, the Alien Property Custodian, whichever date is earlier, except that there shall be deducted from such value any consideration paid for such radio station by the United States." (Section 3 (b) (2).)

The rules established by this Act as to compensation for the assignment to the United States on the use by or for the United States of patents or inventions covered by patents in the United States are found in Section 3 (b) (3) and (4), and are explained in the abovementioned Report as follows:

> In the case of patents described in paragraph (3) of subsection (b) of section 3, which were licensed, sold, or assigned by the Alien Property Custodian to the United States, an aggregate amount of approximately $105,000 was paid by the United States to the Alien Property Custodian and is still held by him, unallocated to any particular patent. In order to relieve the Alien Property Custodian of allocating this amount, it is provided (under section 28 of the trading with the enemy act which is added by the bill) that the custodian shall return this amount to the United States and that the arbiter will determine and award the full compensation. Many of the patents were used prior to the seizure by the Alien Property Custodian. This class of patents is covered by paragraph (4) of subsection (b). If the patent was ultimately seized by the Alien Property Custodian compensation will be paid, for example, for all use, before or after seizure, excluding use between the declaration of war and the armistice, until the patent was disposed of by the Alien Property Custodian. If it was licensed, assigned, or sold to a private party no further compensation by the United States will be paid. If it was licensed, assigned, or sold to the United States, the compensation will be determined under paragraph (3).

By this Act a maximum limit of $100,000,000 is placed upon the awards which the Arbiter may enter on account of the ships and patents and radio station, after the deduction of the administrative expenses in carrying out

these provisions. If the Arbiter determines that the values are in excess of the maximum, he is required to reduce pro rata the amount of each claim. He will then certify the final awards to the Secretary of the Treasury for payment.

Under these provisions 1,180 claims were filed, of which all but 110 involved patents or trade marks.

In accordance with the procedure generally adopted in arbitration proceedings, the Arbiter first took up for determination the question of the scope and limits of the jurisdiction conferred upon him under this Act. His first administrative decision, which was rendered on October 31, 1928,[13] dealt exclusively with patent claims. In that decision he "construed the several provisions of the Settlement of War Claims Act of 1928 dealing with patent claims, announced principles and rules governing the jurisdiction of the Arbiter in such claims, and dealt with some of the defenses with respect thereto put forward by the Government of the United States." The application of that decision to pending claims resulted in the dismissal of claims involving 700 out of some 6,200 patents, and all claims involving trade marks, as clearly not within the jurisdiction of the Arbiter.

A second administrative decision was rendered by the Arbiter on December 12 last, dealing with the bases of determining fair compensation in patent claims. The facts in these cases are now being developed in accordance with these decisions with a view to submission for decision.

An administrative decision was rendered by the Arbiter on March 9, 1929, construing and applying the term "merchant vessel" as used in the Act. The questions involved in determining values in those cases are being discussed extensively in briefs, and after formal hearings to be held in May an administrative decision dealing with those questions, based upon the information developed as the result of those hearings, is to be rendered.

Claims involving two vessels have been withdrawn because at the time of taking by the United States they were no longer German-owned; and claims for nine ships have been dismissed, one because the United States never took possession, four because the vessels were only used by the United States under loan from Cuba which had seized them in Cuban waters, one on the ground that the vessel had been abandoned after being deliberately sunk in Charleston harbor, and the taking by the United States was not under the joint resolution of May 12, 1917, but prior to its passage and under the River and Harbor Act of 1899, and three on the ground that they were auxiliary cruisers of war or tenders to a war vessel and therefore not merchant vessels under the Act. There remain for decision claims based on 94 vessels.

The claim respecting the radio station is in course of preparation for submission.

CHANDLER P. ANDERSON.

[13] This JOURNAL, Vol. 23, p. 193.

WHAT IS A "MERCHANT VESSEL"?

A recent decision of the War Claims Arbiter, Judge Edwin B. Parker, construing the term "merchant vessel" as used in the Settlement of War Claims Act of 1928, will be of interest to students of international law.

Under that Act the United States Government undertakes to compensate the German owner of "any merchant vessel" title to which was taken by the United States under authority of the joint resolution of May 12, 1917. Some 100 ships which had sought refuge in American harbors during the period between August 1, 1914, and July, 1915, had been taken over by the United States under the authority of that resolution. The resolution had provided for the valuation of the vessels by a Naval Board of Survey, but had left the question of compensation open. The Act of 1928, discussed in this JOURNAL (Vol. 22, p. 373), made provision for compensation.

In defense against the claims brought by the owners of the vessels before the War Claims Arbiter, counsel for the United States sought to show that some 20 vessels were not merchant vessels at the time of taking in 1917, because they had in 1914, prior to their seeking refuge in American harbors, served in various ways, principally as colliers, different units of the German war fleet. Relying upon a passage in the report of the Senate Finance Committee and upon a statement made by the Chairman of the Committee, Senator Smoot, in explaining the bill, counsel for the Government contended that such vessels were "naval vessels," and, therefore, excluded from compensation under the Act. The paragraph of the report reads as follows:

> In the first place, the bill applies only to "merchant ships." It is reported that at least four of the ships were naval ships, and these would be excluded. Furthermore, if any of the ships were used as naval ships, even though otherwise within the merchant class, no compensation would be paid for them.[1]

On the Senate floor Senator Smoot explained this provision by stating:

> It was suggested that a specific provision be inserted (in the Settlement of War Claims Act) to the effect that no award should be made for any ship if it was part of the naval auxiliary fleet of Germany. This proposal was rejected because the provisions of the bill are adequate. Compensation will be paid only for "merchant" ships under the terms of the bill. Furthermore, as to the possibility of a merchant ship being a part of the German naval auxiliary fleet, I understand that, although some of the privately-owned vessels were subject to the issuance of German Government orders placing them in the naval auxiliary, no such order was issued as to any of the ships interned in the United States. In any event, however, if it should develop that any of the merchant vessels were actually a part of the naval auxiliary fleet, the provisions of the bill are adequate, for they would no longer be "merchant ships."[2]

[1] Sen. Doc. 273, 70th Cong., 1st sess.

[2] Congressional Record, Vol. 69, Feb. 16, 1928, p. 3174.

The *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich*, two merchant vessels which had been converted into auxiliary cruisers in compliance with the conditions of the Seventh Hague Convention, were among the ships which had sought refuge in American harbors and were interned. They were admittedly excluded from the bill, because they were officially incorporated in the German navy, manned by a naval crew, flew the naval flag, were entered on the navy register, and had made captures and sunk enemy vessels. The Arbiter held that they had been converted into public vessels and were not in 1917 within the term "merchant vessel," notwithstanding the effort of the owners, not acceded to by the United States, to bring about their reconversion by changing their equipment.

The steamer *Locksun* came into the port of Honolulu on October 15, 1914, practically in company with the disabled German cruiser *Geier*. She was serving the *Geier* as a collier. She was interned by the United States with the *Geier* on the authority of an opinion furnished by the Neutrality Board to the effect that she was "part of the equipment" and a tender of the *Geier*, and under the profession of Secretary Lansing that he was unable "to distinguish between the two vessels so as to intern the one and not the other." The *Locksun* had been an unarmed merchant vessel under private command and private crew, on the merchant register, and had been chartered by the German Government under a pre-war arrangement for the requisitioning under charter of merchant tonnage. Nevertheless, because of the intimate association with the cruiser *Geier* at the time of entrance into an American harbor, she was interned by the United States as "a part of the equipment" of the *Geier* and as "stamped with a naval character." The internment was vigorously protested by the German Ambassador at the time, on the ground that the *Locksun* was not a war ship; but the internment was adhered to. In 1917, the Secretary of the Navy had instructed the Naval Board of Survey not to value the vessel and to regard her as a "German naval vessel." The Arbiter held that, in view of these facts and of the lack of evidence that "Congress had any intention of reversing or in any way modifying the official action taken by the Executive Department of the Government with respect to the *Locksun*," she was excluded from compensation under the Act.

The other vessels which had been chartered by the German Navy to act as colliers, supply ships, coal storage ships, etc., and some of which had followed Admiral von Spee's squadron from the Far East across the Pacific to South America before they were emptied and permitted to seek a neutral port of refuge, were deemed to fall into a different class. The Arbiter held these vessels to be "merchant vessels" under the Act. He held that they were not a part of the "naval auxiliary fleet of Germany," but at all times were "privately-owned merchant vessels." He points out [3] that the distinction drawn by Congress was between two well-defined classes of vessels, namely, (a) public vessels, capture of which by a belligerent vests immediate and

[3] Decisions and Opinions of the War Claims Arbiter, p. 92.

complete title in the captor without compensation, and (b) privately-owned merchant ships not a part of the naval auxiliary fleet, which can be condemned only by decision of a prize court or requisitioned under compensation. The decision in the case of the *Locksun*, therefore, must stand on its special facts, distinctive from those connected with any other merchant vessel. It raises the question, however, whether, notwithstanding the Seventh Hague Convention, merchant ships may be interned as war ships without conversion, and under what circumstances this is possible. The subject deserves study.

With respect to the merchant ships which had been chartered to perform coal supply and other services and had then sought refuge in American harbors, the Arbiter points out that, while the United States had not adhered to the Sixth Hague Convention, and while there is some doubt whether the Sixth Hague Convention was applicable to the German port-of-refuge ships which had come into port more than two years before April 6, 1917, nevertheless the Congress had evidently intended in effect to apply the spirit of that convention by requisitioning the vessels, with compensation. He, therefore, held that chartered colliers, coal deposit ships, and similar merchant vessels which, though serving the fleet, were unarmed, without a naval crew, remained on the merchant register, "had none of the physical characteristics of a fighting ship, and were without either the physical equipment or the legal right to engage in aggressive and hostile military operations," were at all times merchant ships. He held that the services rendered were such "as any neutral merchant vessel might have been chartered to perform without affecting her status as a merchant vessel."

The opinion should contribute to the clarification of the distinction between war ships and merchant ships, which occupied so much of the time of the Fourth Commission of the Second Hague Conference in the elaboration and discussion of the Sixth and Seventh Hague Conventions, of the London Naval Conference of 1908, and of the Oxford meeting of the Institute of International Law in 1913.

EDWIN M. BORCHARD.

THE INSTITUTE OF PACIFIC RELATIONS

The meetings of the Institute of Pacific Relations of 1925 and 1927 at Honolulu are to be followed by a meeting of the Institute at Kyoto in the autumn of 1929. These meetings are attempts to bring together cross sections of the people of the Pacific area for frank consideration of their problems. Members will be in attendance from Canada, the United States, New Zealand, Australia, the Philippines, Hawaii, China, Japan, Korea, Russia, Great Britain, and observers representing French groups and the League of Nations and also perhaps from Dutch and Mexican groups. The membership of the groups from each country being entirely unofficial, may

include persons differing widely in views as to the policies of their own countries.

The meeting of the Institute in 1925 was to a large degree an experiment to test the feasibility of an unofficial conference which should consider topics sometimes regarded as too controversial for ordinary meetings. The principle was adopted that no topic should be excluded on the ground of policy, as the members represented personal opinions only. It was found that so delicate a topic as that of immigration and the movements of population could be made the theme for a round-table discussion to the advantage of all interested. Even religion when frankly presented might not be found to appertain to one sect only. At the meeting of 1925 there had been little previous preparation and the sessions were necessarily less productive of substantial results than was desired.

For the meeting of 1927 somewhat careful preparation was made. At that time there was no hesitancy in laying before the Institute the current problems involved in the perplexing situation then prevailing in China. There was certainly the advantage to all of seeing this problem from differing points of view. The material which had been prepared in anticipation of other discussions was very serviceable and pointed the way to more extended preparation for subsequent meetings of the Institute.

Research and other committees were named in 1927 to prepare for the session of 1929 and many items upon the agenda will have as a background carefully drafted data papers. Among the principal topics to be discussed at Kyoto are problems of food and population, treaty revision, financial problems, industrialization, tariff and foreign investments, disarmament, Manchurian problems, cultural problems, and communications. There will also be opportunity to present any other topic which may seem timely.

Manifestly such a conference for understanding of international relations will have significant results such as cannot flow from official discussions where each person must represent his state and may not be free to offer his personal opinion.

GEORGE GRAFTON WILSON.

CURRENT NOTES

EXEMPTION OF ALIENS FROM TAXATION

An unusually important decision was rendered by the Supreme Court of the United States on February 18, 1929, in the case of Jens C. Nielsen, Administrator, *v.* R. E. Johnson, Treasurer of the State of Iowa (not yet reported).[1] Anders Anderson, the intestate, was a Danish subject residing in Iowa, where he died on February 9, 1923, leaving his mother, a resident and subject of Denmark, his sole heir under the law and entitled by inheritance under the laws of Iowa to his personal property, which was slightly in excess of $3,000. Section 7315 of the Code of Iowa (1927) provided that an estate passing to the mother or other named close non-resident alien relatives of the deceased was subject to an inheritance tax of 10 per cent, whereas an estate of less than $15,000 passing to a parent who was not a non-resident alien was free from tax. The administrator asserted that the provisions of the Iowa statute were void on account of being in conflict with Article VII of the treaty of September 26, 1826, between the United States and Denmark, which was renewed, with the exception of Article V, by the Convention of April 11, 1857. Article VII provided that

> No higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of the other party, upon any personal property, money or effects of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state respectively.

The Supreme Court of the United States held that "There is a discrimination based on alienage" in the Iowa statute, that a "narrow and restricted interpretation of the treaty . . . is not consonant with the principles which are controlling in the interpretation of treaties," and that "when their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own particular construction of it."

After examining carefully the diplomatic correspondence between the United States and Denmark leading up to and subsequent to the signing of the convention of 1826, and considering the complaints against Danish taxes filed with the State Department by American citizens residing in the Danish West Indies, which apparently influenced the United States in having the seventh article added to the draft of the convention, the Supreme Court of the United States reversed the decision of the Supreme Court of Iowa and held that the discriminatory tax on the power of a Danish subject in Iowa

[1] Printed herein, *infra*, p. 422.

to dispose of his property to a Danish subject in Denmark was in conflict with the provisions of Article VII of the convention of 1826 and could not be collected.

The learned opinion of the court, written by Mr. Justice Stone, contains an interesting discussion on the meaning of the term *droit de détraction*, and the conclusion is reached that it was "a form of inheritance tax, but one which, because of its imposition only with respect to property of aliens who normally removed it from the realm, was sometimes associated with the removal rather than the inheritance of the property."

With the increase of modern commerce, the investment of American capital in foreign countries and the loans that have been made by American interests to foreign municipalities and governmental agencies the question of the exemption from taxation under our treaties becomes of vastly increasing importance. These enterprises not infrequently involve residence by American citizens in foreign countries. Their liability to discriminatory income taxes and inheritance taxes as aliens may be a deciding factor in determining whether they can afford to accept positions abroad at what seem to be attractive salaries, which, however, are greatly cut down when these taxes are taken into account.[2]

In connection with investments by American concerns abroad, some of the cases decided by British courts are of interest. In the case of Mitchell (Surveyor of Taxes) *v.* Egyptian Hotels, Limited, [1915] A. C. 1022, a company incorporated in England carried on the hotel business in Egypt until 1908, when the articles of association were amended to provide that the Egyptian business of the company should be carried on and managed by a local board to meet only in Egypt. The profits were to be retained in Egypt, except that there should be remitted to England what might be necessary to pay dividends to stockholders resident there. An income tax was assessed upon the full amount of the company's profits, on the ground that the controlling power of the company remained with the London board. The House of Lords, in an opinion rendered on July 9, 1915, held that the division of the profits formed no part of the profit-earning business of the company and that as the company's business was wholly carried on abroad, the company was assessable to income taxes in respect only of profits remitted to England.

In contrast with the decision reached in the case of Nielsen *v.* Johnson that aliens protected by the treaty should receive the same treatment as nationals, is the decision in a recent arbitration case under the Franco-Spanish con-

[2] As originally enacted the United States income tax statutes did not give credit for the amount of taxes paid to foreign governments. The present law, however, allows such credit. (Section 131 (a) (1) Revenue Act of 1928, Session Laws, Seventieth Congress, 1st Session, Part I, page 829, reads as follows:

"(a) Allowance of credit.—The tax imposed by this title shall be credited with:

"(1) Citizen and Domestic Corporation. In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States."

vention of January 7, 1862, that aliens protected by the treaty were exempt from certain forms of taxation to which nationals were subject. It was contended by the Spanish Government that, under the convention, Spanish subjects who had settled in France were not liable to taxation under the French law of July 1, 1916, relative to taxes on extraordinary war profits and should be exempted from such taxes. Mr. Gustave Ador, President of the Swiss Republic, was the umpire designated by the French and Spanish Governments. In making his award in favor of Spain the umpire considered, as did Mr. Justice Stone in the present Danish case, the correspondence exchanged between the negotiators. He referred to the fact that the Ambassador of France to Spain in submitting a draft of the treaty had proposed exemption of French subjects in Spain and also of Spanish subjects in France "from any war contribution, prestation, loans, advance contributions, forced gifts and also extraordinary taxes which would have an obviously useful purpose and are exclusively for nationals." The French Government contended that it was inequitable to exempt Spaniards settled in France and profiting by the war through supplies sold by them to the French Government from the War Profits Tax Law of July 1, 1916. The umpire, however, ruled that it was for the French State to give notice of the termination of the convention of 1862 as provided by its Article 31 in case it did not intend to have this discrimination. The umpire held that the Spanish subjects in France were exempt from the French war taxes.[3]

The Anglo-American convention of March 2, 1899 (31 Stat. L. 1939), concerning the tenure and disposition of real and personal property, mentioned in one of the notes of Mr. Justice Stone, has been considered by our courts in relation to the exemption of estates of British subjects from discriminatory inheritance tax statutes. In the case of McKeown *v.* Brown (1914), 167 Iowa 489, 149 N. W. 593, the question considered was whether the British heir to real property in Iowa could be subjected to the payment of a higher inheritance tax than was required to be paid by citizens. The court held that Article 1 of the convention of March 2, 1899, precludes the State from assessing a higher inheritance tax on British heirs than is assessed against heirs who are American citizens.

The question considered by the court in the case of *In re* Moynihan's Estate (1915), 172 Iowa 571, 151 N. W., 504, L. R. A. 1916D, 1127, was whether British heirs of an American citizen could be subjected to the payment of a higher collateral inheritance tax on personal property than is required to be paid by American citizens. The court held that Article 2 of the convention of March 2, 1899, precludes the assessment of higher inheritance taxes against such British subjects. The opinion in this case was affirmed on rehearing, 154 N. W. 904.

In Brown *v.* Daly's Estate (1915), 172 Iowa 379, 154 N. W. 602, the Supreme Court of Iowa reconsidered the question whether real and personal

[3] Clunet, *Journal du droit international*, Vol. 50 (1923), pp. 217–243.

property of an American citizen inherited by British subjects was subject to a discriminatory tax, and after examination of the Anglo-American convention of March 2, 1899, and treaties with Germany, Honduras, and Argentina, held that the tax could not be greater than is exacted from native citizens.

The same result was reached in the case of Trott *v.* State (1919), 41 N. D. 614, 171 N. W. 827, 4 A. L. R. 1372, in which the court held that Section 8977, Compiled Laws of North Dakota, 1913, which required non-resident aliens to pay a collateral inheritance tax twenty-five per cent higher than are paid by citizens or resident aliens was rendered nugatory by the provisions of the convention of March 2, 1899, so far as British subjects were concerned.

The provisions of the convention of March 2, 1899, with Great Britain were made applicable to numerous British possessions pursuant to the convention of January 13, 1902 (32 Stat. L. 1914). By the decision of the Supreme Court of the United States in the case of Sullivan *v.* Kidd, 254 U. S. 433, it was held that the convention was not applicable to Canada. Canada obtained the benefits of the convention by means of a special convention signed October 21, 1921 (42 Stat. L. 2147).

In accordance with the provisions contained in clause 3 of Article 4 of the convention of March 2, 1899, providing for notice by the United States of the extension and application of the convention to territories of the United States "beyond the seas," the convention was extended to Porto Rico on September 13, 1916.[4] On account of the provisions contained in Act No. 223 of the Hawaiian Legislature passed in the Session of 1917[5] relating to inheritance tax and imposing a heavier tax upon aliens, the provisions of the convention of March 2, 1899, were extended to the Territory of Hawaii on October 5, 1921.[6]

Articles similar to Article VII of the Danish treaty of September 26, 1826, are included in the recent treaties of friendship, commerce and consular rights concluded by the United States, beginning with the treaty with Germany signed December 8, 1923.[7] The other treaties of this series which have been brought into force are the treaties with Hungary, signed June 24, 1925; Estonia, signed December 23, 1925; Honduras, signed December 7, 1927; and Latvia, signed April 20, 1928. The articles are also included in Treaties of Friendship, Commerce and Consular Rights, signed with Salvador February 22, 1926, and with Austria June 19, 1928, which have received the advice and consent of the Senate to ratification, and in the Treaty of Friendship, Commerce, and Consular Rights, signed with Norway June 5, 1928, which is now before the Senate.

WILLIAM R. VALLANCE.

[4] See Ex. Doc. C, 64th Cong. 1st sess., and resolution passed by the Senate of the United States on Aug. 29, 1916, Congressional Record, Vol. 53, Pt. 13, p. 13348.

[5] Sec. 1323 of Chap. 95 of the Revised Laws of Hawaii.

[6] See resolution passed by the Senate of the United States on March 7, 1921, Congressional Record, Vol. 61, Pt. 1, pp. 13–16, and Ex. Q, 66th Cong. 2d sess.

[7] Printed in Supplement to this JOURNAL, Vol. 20, p. 4.

NEW NATURALIZATION AND CITIZENSHIP LEGISLATION BY THE CONGRESS

The nationality laws of the various countries are in a state of flux. Those of the United States are no exception. Almost the last of the official acts of President Coolidge was the signing of two important legislative measures concerning naturalization and citizenship, Public—No. 962, 70th Congress, An Act to supplement the naturalization laws, and for other purposes,[1] approved March 2 1929, and Public—No. 1011, 70th Congress, An Act relating to declarations of intention in naturalization proceedings,[2] approved March 4, 1929. These remedial statutes are largely administrative in nature.[3]

The Act of March 2, 1929, *supra*, effective July 1, 1929, grants relief to thousands of aliens who have been prevented from applying for naturalization because no immigration record of admission to the United States for permanent residence could be found at the ports of entry. Among this group are aliens who came to the United States when infants, some who came as visitors originally, and some as seamen who were discharged from their ships for the purpose of re-signing on outward bound vessels but who remained here. The Commissioner General of Immigration is authorized to make a record of such an arrival provided the alien is not ineligible to citizenship, entered the United States prior to June 3, 1921, has resided therein continuously since, is a person of good moral character, and is not subject to deportation. For the purpose of the immigration and naturalization laws, the alien will then be deemed to have been lawfully admitted to the United States for permanent residence. No valid declaration of intention may be made by any alien until there has been issued by the Commissioner of Naturalization a certificate of his lawful entry into the United States for permanent residence, regardless of the date of arrival.

In lieu of residence for at least one year continuously in the State, Territory or District of Columbia in which the petition for naturalization is made, the petitioner must have resided in the *county* where he applies for at least *six months* immediately prior to the application. He must have been a resident of the United States during the five years immediately preceding the application, and between that date and his admission to citizenship. Where a portion of the required five-years' residence (other than the last six months) has been outside of the county, it may be proved by depositions made before a naturalization examiner. As to persons rendering certain special service, such as in the army or navy, the usual requirements as to residence are waived. "Continuous residence" within the United States has been legislatively defined. The absence in the country of the alien's allegiance continuously for more than six months but less than a year during the five-year period raises a presumption that the continuity has been broken. This

[1] 2d Sess., H. R. 349. [2] *Ibid.*, H. R. 16440.

[3] See text of these two laws in Supplement to this JOURNAL, pages 114 and 119.

may be overcome by the presentation of satisfactory evidence that the absence was due to "a reasonable cause." *Any absence* extending continuously for one year or more conclusively breaks the continuity of residence.

A certificate of citizenship may be issued to any individual applicant in this country over 21 years of age on proof satisfactory to the commissioner that he or she derived United States citizenship through the naturalization of a parent or husband. A certificate of arrival must be issued, and the applicant must take and subscribe before a designated representative of the Bureau of Naturalization an oath of allegiance to the United States. Hundreds of thousands of citizens will be able to take advantage of this provision.[4] Photographs of the applicant must be attached to the various naturalization papers.

The following fees are fixed by the new act: $20 for establishing the immigration record of the alien's arrival in the United States; $5 for any certificate of the alien's arrival; $5 (in lieu of former fee of $1) for a declaration of intention; $10 (in lieu of former fee of $4) for a petition for citizenship and the issuance of the certificate of citizenship, if granted; $10 for a new declaration or certificate of citizenship in lieu of one lost, mutilated or destroyed; $10 for a special certificate of citizenship furnished through the Department of State, to secure recognition as a United States citizen by the country of former allegiance; and $10 for a certificate of derivative citizenship. Drastic penalties of fine or imprisonment or both are prescribed for violation of the Act.

The commissioner must prepare initially and annually thereafter a report and analytical comment upon the mass of exceedingly valuable data in the duplicate naturalization papers filed in the Bureau of Naturalization since 1906. These papers comprise more than 5,500,000 declarations of intention, 3,000,000 petitions for naturalization, and 2,600,000 certificates of citizenship, a total of over 11,000,000 documents. The information will be invaluable, especially to Congress in considering immigration and naturalization legislation.

The Act of March 4, 1929, *supra*, effective as to declarations of intention after 60 days, will relieve the declarant from naming specifically the prince, potentate, state or sovereignty of which he may be at the time a citizen or subject. The previous requirement that the ruler's name be set forth resulted in much embarrassment and hardship to thousands of applicants through the innocent misstatement of the wrong allegiance.[5] Before admission to citizenship, however, specific renunciation of allegiance to the

[4] It had been previously held in the case *In re* Tate (D. C., W. D. Pa., 1924), 1 Fed. (2d) 457, that there was no statutory power by which a court could issue a certificate of citizenship to one claiming to be a citizen through the naturalization of his father during the son's minority.

[5] It was held in United States *v.* Vogel (C. C. A., 2d Cir., 1919), 262 Fed. 262, that there is no power in a naturalizaton court to amend an inaccurate allegation of allegiance in a declaration of intention or petition for naturalization through an order *nunc pro tunc*.

sovereign by name must be made. Certain declarations, which include an erroneous statement of allegiance due to change of political boundaries, the creation of new countries, or the transfer of territory from one country to another, are validated. Declarations of intention and petitions for naturalization may not be made outside of the office of the clerk of court. The Alien Veteran's Naturalization Act of May 26, 1926,[6] is revived for two years. From many points of view this new legislation is a forward step.

HENRY B. HAZARD.

MISCELLANEOUS CURRENT NOTES

Fellowships in International Law. The Division of International Law of the Carnegie Endowment for International Peace has announced the following awards of Fellowships in International Law for the academic year 1929–1930:

Teacher Appointments: Dennis DeWitt Brane, M.A., Western Reserve University (renewal); Charles Wooten Pipkin, M.A., Louisiana State University; Vangala Shiva Ram, M.A., Ph.D., Lucknow University; Hannah Grace Roach, M.A., Ph.D., Connecticut College; Thomas J. B. Wenner, M.A., New York University; Edouard E. Hoerschelmann, Assistant Professor of the State University of Moscow; Hans Gustav Roemer, M.A., Ph.D., University of Hamburg.

Student Appointments: Robert Taylor Cole, M.A., Louisiana State University; Helen May Cory, M.A., Columbia University; Edward Dumbauld, A.B., LL.B., Harvard University; Harold Hansen, Referendar, University of Kiel; Chesney Hill, M.A., Harvard University; Dorothy Trautwein, A.B., Radcliffe College.

The Hague Academy of International Law will open its seventh annual session on July 8, which will continue, as usual, for eight weeks of two four-week periods, from July 8 to August 3, and from August 5 to August 30, respectively, with the same number of lectures in each. During each of the periods, fundamental courses will be given on the historical development and general principles of international law, both public and private, while a number of lectures will be devoted to special subjects, selected according to the competence of professors, and as far as possible among legal problems of present-day interest. The teaching is given in French, and no fees are charged. Persons wishing to attend the classes should send their applications for admission to the Secretary of the Managing Board at The Hague, giving their full names, nationality, occupation and address. Students have access free of charge, to the library of the Peace Palace and a reading- and writing-room. Other special facilities are offered to persons attending the Academy during their stay at The Hague, or at Scheveningen, thanks to the enterprise of the *Association of students and former students of the Academy,*

[6] See 44 Stat. 654.

which has made arrangements with hotels and boarding-houses for reduced rates. Full information in this respect will be supplied on application to the Secretary of the above-mentioned Association, Palace of Peace (Room No. 50), at The Hague.

Treaty for the Renunciation of War, August 27, 1928. In conformity with Article III, the plenipotentiaries of Germany, the United States, Great Britain, Canada, Australia, New Zealand, the Union of South Africa, the Irish Free State, India, Italy, and Czechoslovakia, met at the Department of State in Washington on March 2, 1929, and deposited with the Government of the United States their instruments of ratification. Instruments of ratification were subsequently deposited by Poland on March 25, and by Belgium on March 27, thus leaving France and Japan the only signatories which have not as yet ratified. The treaty will take effect as soon as their instruments of ratification have been deposited at Washington. The following countries have officially deposited their adherences to the treaty in the Department of State: Afghanistan, Albania, Austria, Cuba, Dominican Republic, Ethiopia, Norway, Portugal, Rumania, Union of the Soviet Socialist Republics, Kingdom of the Serbs, Croats and Slovenes, and Siam. The text of the treaty was printed in the Supplement to this JOURNAL, Volume 22, page 171.

Conciliation and Arbitration Treaties of the United States. During the administration of Secretary of State Kellogg, which began on March 4, 1925, and ended on March 28, 1929, arbitration treaties were signed by the United States with the following countries: Albania, October 22, 1928; Austria, August 16, 1928; Bulgaria, January 21, 1929; Czechoslovakia, August 16, 1928; Denmark, June 14, 1928; Ethiopia, January 26, 1929; Finland, June 7, 1928; France, February 6, 1928; Germany, May 5, 1928; Hungary, January 26, 1929; Italy, April 18, 1928; Liberia, February 10, 1926; Lithuania, November 14, 1928; Netherlands, February 27, 1929; Norway, February 20, 1929; Poland, August 16, 1928; Portugal, March 1, 1929; Rumania, March 21, 1929; Serbs, Croats and Slovenes, January 21, 1929; Sweden, October 27, 1928. When he left office, negotiations were still in progress for the conclusion of arbitration treaties with the following countries: Belgium, Egypt, Estonia, Great Britain, Greece, Japan, Latvia, Luxemburg, Persia, Siam, Spain, Switzerland, Turkey.

During the same period, conciliation treaties were signed with the following countries: Albania, October 22, 1928; Austria, August 16, 1928; Bulgaria, January 21, 1929; Czechoslovakia, August 16, 1928; Ethiopia, January 26, 1929; Finland, June 7, 1928; Germany, May 5, 1928; Hungary, January 26, 1929; Lithuania, November 14, 1928; Poland, August 16, 1928; Rumania, March 21, 1929; Serbs, Croats and Slovenes, January 21, 1929. Negotiations are still in progress for the conclusion of conciliation treaties with the following countries: Belgium, Egypt, Estonia, Greece, Japan, Latvia, Luxemburg, Persia, Siam, Turkey.

Pan American Trade Mark Conference. The Sixth International Conference of American States, which met at Havana from January 16–February 20, 1928, adopted a resolution authorizing the Governing Board of the Pan American Union to convene a special conference of the representatives of all governments members of the Union for the purpose of considering the problem of Inter-American protection of trade marks. The conference was convened in Washington on February 11, 1929, and adjourned on February 20. On February 19 it adopted a convention for the protection of trade marks among the American states and an accompanying protocol for the establishment of an Inter-American Trade Mark Bureau. The text of the convention and protocol will be printed in the next issue of the JOURNAL, accompanied, it is expected, by an article on the conference.

United States Foreign Service. Written examinations for commissions in the Foreign Service of the United States will be held commencing June 24, 1929, at Atlanta, Boston, Chicago, Cincinnati, Denver, New Orleans, New York, Philadelphia, St. Louis, St. Paul, San Francisco, Seattle and Washington. The examinations will be completed by oral tests at Washington beginning September 30, 1929. Applicants desiring to qualify must be specially designated for examination. Applications should be addressed to the Secretary of State, and must be filed not later than forty days before the date set for the written examinations.

Institute of Politics, Williamstown, Massachusetts. The ninth session of the Institute will be held August 1–29, 1929, and will be devoted to the study of a group of problems on world economic stabilization. There will also be conferences on the relations of the United States with Canada, Mexico, and other Latin-American countries, and problems underlying disarmament. Among the foreign lecturers will be William E. Rappard, of Geneva; André Seigfried, of Paris; Hjalmar Schacht, of Berlin; Count Giovanni Elia, of Rome; and T. E. Gregory, of London. The public is invited to attend the lectures and addresses, but attendance at the meetings of the round tables is limited to duly enrolled members of the Institute. Membership is open to men and women who are competent to contribute to the discussions. A registration fee of $25 is charged. Applications for membership and further information may be obtained from the Institute of Politics, 1 Hopkins Hall, Williamstown, Massachusetts.

The Second Annual Session of the *Southeastern Citizenship Conference* at Emory University, Atlanta, Georgia, took place February 12–16. This conference was established in 1928. Its purpose is to stimulate a wider and more intelligent interest in public affairs. Problems of a national, international, and local character are dealt with. International affairs occupied the chief place on the program this year. On the evening of February 12, Dr. Antonio S. de Bustamante, judge of the Permanent Court of International Justice, delivered the opening address on "The World Court and the United States." This address was very enthusiastically received by a

large audience. Dr. Bustamante also led an open forum discussion on the same topic, February 13. The new Germany was very ably treated in one lecture and two conferences by Dr. Walther Merck, Chairman of the National Committee on Education in Germany. Mr. A. T. Polyzoides, Editor of *Atlantis*, delivered one lecture on Russia and led a round table conference on "Ten Years After the Versailles Treaty." This conference provoked considerable discussion. State and local government received a great deal of attention also. The attendance at the conference has been very good. This year more than 400 people registered, most of them coming from the South. Dr. Bustamante's address was heard by about 500 people. Plans are already going forward for the Third Annual Session of the Conference to be held in February, 1930.

Prize competition. The Institució Patxot of Catalonia announces a competition for the award of a prize of one thousand pounds sterling (£1000) for the best work on the influence of international law and contemporary international institutions on internal public law. The work must be original and submitted anonymously before December 31, 1930, in three typewritten copies accompanied by a sealed envelope containing the name and address of the author, with a maxim, quotation, phrase, or word on the outside of the envelope identical with a similar inscription on the manuscript by which the jury can identify it. The Jury of Award consists of Dr. D. Anzilotti, President of the Permanent Court of International Justice; Jonkheer W. J. M. von Eysinga, Rector of the University of Leiden; and Dr. F. de P. Maspons i Anglasell, Delegate of the Institució Patxot. Further conditions of the competition may be obtained by addressing the Institució Patxot, C. Cucurulla, 1 & 3, Barcelona, Spain.

Publications of the State Department. At its last session, Congress appropriated the sum of $50,000 to enlarge the scope of the publications of the Department of State, as urged before the Bureau of the Budget and Congressional appropriations committees by representatives of the American Society of International Law and the Conference of International Law Teachers (see editorial in the last number of the JOURNAL, pages 121–126). Three other organizations have also appointed committees to support this movement, namely, the American Political Science Association, the American Historical Association, and the Association of American Law Schools. A joint meeting of the committees of these five coöperating organizations will be held during the forthcoming annual meeting of the American Society of International Law on the morning of April 26 at nine o'clock at No. 2 Jackson Place, Washington, D. C.

Visa fees. On the basis of the Act of February 25, 1925, authorizing the President to enter into agreements with the governments of foreign countries for the mutual waiver or reduction of visa fees for persons who are non-immigrants, an agreement was concluded on March 11, 1929, between the United States and Poland whereby the fee for visas was reduced from $10

to $4. Thirty agreements of this kind have now been concluded by the United States, twenty-two providing for a complete waiver of the passport visa fee, while the other eight provide for reductions to amounts varying from $1 to $4. The only European countries which have so far declined the proposal of the United States to conclude such agreements are England, France, Greece, Hungary, Latvia, Lithuania, Norway, Rumania and Turkey.

Conference on Safety of Life at Sea. An international conference to revise and amend the convention of 1914 for safety of life at sea will be convened at London on April 16, 1929. The main provisions of the convention of 1914 relate to the safety of navigation by the destruction of derelicts, the study and observation of ice conditions, the maintenance of the ice patrol in the North Atlantic Ocean and other measures, to the construction of vessels, to radiotelegraphy, life-saving appliances and fire protection on vessels, and to safety certificates. The convention was ratified by some of the signatory states but not by all of them. It has not been ratified by the United States Government. Owing to the war and other causes the convention was not brought into force completely as a convention in any country, though parts of it have been adopted and put in force by several countries under their national law. In addition to the United States, the British Government has invited to the conference the British Dominions, India, Belgium, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Russia, Spain and Sweden, as well as the League of Nations Advisory and Technical Committee for Communications and Transit *ad audiendum.*

European Radio Conference. Upon the invitation of the Czechoslovak Government, a European Radio Conference will be held at Prague April 4–13, 1929, to which the United States has been invited to send non-voting observers. Other governments represented will be Germany, Austria, Belgium, Denmark, Egypt, Spain, Estonia, France, Great Britain, Hungary, Ireland, Italy, Latvia, Norway, Netherlands, Poland, Rumania, Serbia, Sweden, Switzerland, and Russia. The principal subject on the agenda will be the allocation of wave lengths.

Conference on the Counterfeiting of Currency. The United States will be officially represented at the Conference on the Counterfeiting of Currency convened by the League of Nations at Geneva on April 9, 1929. The conference will have before it as a working basis a draft convention drawn up by the mixed committee of the League and will endeavor to arrive at a final convention for the suppression of the counterfeiting of currency.

International Conference on Economic Statistics. This conference met at Geneva from November 26 to December 14, 1928, for the purpose of arranging a convention with regard to the scope and methods of economic statistics. It was attended by delegates of forty-two countries, including the United States, of which seven were non-members of the League of Nations. On December 14 a convention was signed by twenty-three states. The delegations of the non-signatories were, like the delegation of the United

States, without full powers, and the question of signing was deferred for subsequent consideration by their governments. The principal features of the convention are those dealing with statistics of production, statistics of commerce, and organization for future work. The provisions of the convention being in the nature of a minimum program, a number of recommendations were adopted looking to further expansion and more wide-reaching standardization of statistical work. Four resolutions were also adopted.

The United States and Morocco. On November 23, 1928, the Shereefian Government, acting through the French Resident-General in Morocco as Minister of Foreign Affairs, requested the United States Government to consent to the application to American nationals in the Tangier Zone of a general law proposed by the International Legislative Assembly, under which any increase of consumption taxes would be provisionally effective the day after the measure proposed to create them had been deposited in the office of the Assembly, thus giving the consent of the United States to subsequent specific laws, assuming it were granted, a retroactive effect. The consent of the United States is required because of the treaty rights acquired by the United States under the Act of Algeciras and previous treaties. The request was supported by notes submitted by the French, British, Italian and Spanish embassies, representing the views of the signatories of the Revised Statute of Tangier. On February 14, 1929, the United States replied that while it is "desirous of facilitating the task of the Administration of Tangier in such manner as may be possible and appropriate, this Government is unable to concur in a proposal such as the contemplated law which would involve a radical departure from its well-established practice in Morocco in conformity with its treaty rights, and a substantial alteration of those rights." The United States added that if it were given the opportunity to examine proposed taxation measures in advance, it would take steps, where possible, to give its consent to the application of those measures immediately after they had been duly adopted by the competent legislative body in Tangier.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1928–FEBRUARY 15, 1929

(With references to earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. I. I.*, Bulletin de l'Institut Intermédiaire International. *B. I. N.*, Bulletin of international news; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. Q. B.*, League of Nations Quarterly Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. press notice; *R. D. I.*, Revue de Droit International; *R. G. D. I. P.*, Revue Générale de Droit International Public; *R. D. I. P.*, Revue de Droit International Privé; *R. J. I. L. A.*, Revue Juridique International de la Locomotion Aérienne; *R. R.*, American Review of Reviews; *U. S. C. R.*, U. S. Commerce reports.

April, 1928

25 SALVADOR—URUGUAY. Exchanged ratifications of arbitration treaty signed Nov. 7, 1924. *P. A. U.*, Dec., 1928, p. 1259.

June, 1928

25 ITALY—PERSIA. Provisional most-favored-nation commercial treaty came into force. *U. S. C. R.*, Dec. 17, 1928, p. 778.

July, 1928

13 VENEZUELA NATURALIZATION LAW. New law to supersede that of May 24, 1913, signed by the President. *P. A. U.*, Feb., 1929, p. 179.

24 JAPAN—NEW ZEALAND. Commercial agreement arranged by exchange of notes. Text: *Pacific affairs*, March, 1929, p. 123; *G. B. Treaty Series*, no. 6 (1929), *Cmd.* 3287.

September, 1928

1 THE INTERNATIONAL. Sixth World Congress of Communist International adopted program at meeting in Moscow. Text: *E. E. P. S.*, Dec. 31, 1928, p. 241.

7 BRAZIL—PARAGUAY. Exchanged ratifications of telegraph convention signed in Asuncion on Oct. 8, 1927. *P. A. U.*, Dec., 1928, p. 1256.

12-13 RADIO MARITIME COMMITTEE. Formed at conference of wireless maritime associations in Madrid. *World Trade*, Jan., 1929, p. 83.

24 LITHUANIA—RUSSIA. *Modus vivendi* providing for mutual most-favored-nation treatment arranged by exchange of notes. *U. S. C. R.*, Dec. 17, 1928, p. 778.

24-29 WORLD MOTOR CONGRESS. Met in Rome with representatives of 40 countries. *World Trade*, Jan., 1929, p. 77.

25 GREAT BRITAIN—PANAMA. Signed most-favored-nation commercial treaty. *U. S. C. R.*, Dec. 24, 1928, p. 844.

28 AUSTRIA—SPAIN. Commercial agreement of Feb. 3, 1925, modified by exchange of notes. *U. S. C. R.*, Feb. 25, 1929, p. 504.

October, 1928

5 AUSTRIA—LITHUANIA. Signed most-favored-nation commercial treaty in regard to customs duties. *U. S. C. R.*, Dec. 24, 1928, p. 843.

7–14 INTERNATIONAL CONGRESS OF POPULAR ARTS. Held at Prague under auspices of International Committee on Intellectual coöperation with 31 nationalities represented. Resolutions: *B. of inf. and ref. sect.*, Oct.–Nov., 1928, p. 3.

8 ALIENS IN RUMANIA. Decree concerning extension of permits to reside in Rumania came into force. Main provisions: *Times* (London), Oct. 16, 1928, p. 16.

10 CHINA. General Chiang Kai-shek inaugurated in Nanking as President of National Government and of the Presidents of the Five Councils. *North China Herald*, Oct. 13, 1928.

15 FINLAND—LITHUANIA. Temporary most-favored-nation commercial treaty arranged by exchange of notes, came into force. *U. S. C. R.*, Dec. 17, 1928, p. 777.

19 PANAMA CONSTITUTION. Article 6 on citizenship amended by legislative decree. *P. A. U.*, Feb., 1929, p. 178.

19 SPAIN—SWEDEN. Exchanged ratifications of revised commercial treaty of May 28, 1928. *World Trade*, Jan., 1929, p. 168.

22 INTERNATIONAL TIME TABLE CONFERENCE. Held in Vienna. *World Trade*, Jan., 1929, p. 71.

23 HUNGARY—LITHUANIA. Signed temporary most-favored-nation commercial agreement at Kovno. *U. S. C. R.*, Jan. 7, 1929, p. 50.

23–27 RED CROSS. 13th International Red Cross Conference met at The Hague with delegates from over 46 nations. *R. int. de la Croix-Rouge*, Nov., 1928, p. 1011.

30 GERMANY—LITHUANIA. Signed most-favored-nation commercial and navigation treaty. *U. S. C. R.*, Dec. 24, 1928, p. 843.

30 ODER RIVER COMMISSION. Special agreement signed at London between Czechoslovakia, Denmark, France, Germany, Great Britain and Sweden, on the one hand, and Poland, on the other, for submission to Permanent Court of International Justice of question concerning the territorial limits of jurisdiction of International Commission of the Oder. *L. N. M. S.*, Dec. 15, 1928, p. 395. Text: *G. B. Treaty Series*, no. 1 (1929), *Cmd.* 3250.

November, 1928

1 EGYPT—PALESTINE. Provisional most-favored-nation agreement arranged by exchange of notes on June 6 and 21, 1928, came into force. *U. S. C. R.*, Dec. 24, 1928, p. 843. Text: *G. B. Treaty Series*, no. 26 (1928), *Cmd.* 3236.

1 EGYPT—SYRIA. Commercial agreement came into force, providing for mutual application of most-favored-nation treatment. *U. S. C. R.*, Mar. 11, 1929, p. 641.

1 GREECE—YUGOSLAVIA. Exchanged ratifications of most-favored-nation treaty signed Nov. 2, 1927. *U. S. C. R.*, Jan. 21, 1929, p. 178.

1 ITALY—YUGOSLAVIA. Exchanged ratifications of treaty of commerce and navigation signed Nov. 2, 1927. *U. S. C. R.*, Jan. 21, 1929, p. 178.

1 OPIUM CONFERENCE. National opium suppression conference opened in Nanking. *North China Herald*, Nov. 10, 1928, p. 208.

1 RUSSIA—YEMEN. Signed commercial treaty recognizing independence of the Yemenis. *Soviet Union R.*, March, 1929, p. 49.

3 FINLAND—SPAIN. Exchanged ratifications of agreement of Aug. 11, 1928, to modify commercial treaty of July 16, 1925. *U. S. C. R.*, Jan. 14, 1929, p. 109.

8 HUNGARY—SWEDEN. Signed most-favored-nation commercial treaty. *U. S. C. R.*, Dec. 17, 1928, p. 778.

10 ALBANIA—GREECE. Exchanged ratifications of most-favored-nation treaty of commerce and navigation signed Oct. 13, 1926. *U. S. C. R.*, Jan. 21, 1929, p. 178.

12 CHINA—NORWAY. Commercial agreement signed at Nanking. Text: *North China Herald*, Dec. 1, 1928, p. 338; *Europe*, Jan. 5, 1929, p. 27.

12 CHORZOW FACTORY CASE. Agreement for settling the dispute was signed between Polish Treasury and the German companies mainly interested on Nov. 12, and approved by the governments concerned in the case before the Permanent Court, on Nov. 27. Court notified in letters dated Dec. 6 and 13, 1929, and work of expert committee at The Hague terminated. *L. N. M. S.*, Jan. 15, 1929, p. 418.

12 FRANCE—SAAR. Signed convention concerning mutual reduction of taxes, etc. Text: *J. O.*, Jan. 16, 1929, p. 563.

12–22 INTERNATIONAL EXHIBITIONS. Diplomatic conference held in Paris with representatives of 38 nations, the United States being represented by an observer. On Nov. 22 a convention was signed by representatives of 23 countries, designed to limit and regulate international expositions. Analysis: *World Trade*, Jan., 1929, p. 35.

12–21 PERMANENT COURT OF INTERNATIONAL JUSTICE. 15th extraordinary session held to consider case concerning payment of various Serbian loans issued by France. *L. N. M. S.*, Dec. 15, 1928, p. 394.

13 MEXICAN OIL. Regulations to govern Mexican petroleum industry issued by President of Mexico. Text: *U. S. Daily*, Dec. 26, 1928, p. 1.

13–17 ROAD TRAFFIC. Permanent committee on road traffic of the League of Nations met in Paris. Resolution on freedom of motor transport. Text: *World Trade*, Jan., 1929, p. 75; *L. N. M. S.*, Dec. 15, 1928, p. 390.

13 SPAIN—SWITZERLAND. Commercial treaty of May 15, 1922, denounced by Spain. *U. S. C. R.*, Dec. 10. 1928, p. 713.

14 GREECE—NORWAY. Exchanged ratifications of most-favored-nation treaty of commerce and navigation, signed June 29, 1927. *U. S. C. R.*, Feb. 4, 1929, p. 314.

15 BRAZIL—COLOMBIA. Treaty on international boundaries, signed in Rio de Janeiro, brings to a close a boundary dispute dating back to the treaties of 1750 and 1777 between the Portuguese and Spanish crowns. *P. A. U.*, Feb., 1929, p. 173.

15 BRAZIL—PERU. Signed convention on direct wireless communication. *P. A. U.*, Feb., 1929, p. 173.

15 BRAZIL—URUGUAY. Exchanged ratifications of convention of Feb. 16, 1928, on employment of funds from boundary settlement. *P. A. U.*, Feb. 29, 1929, p. 174.

15 BRAZIL—URUGUAY. Exchanged ratifications of sanitary convention in Montevideo. *P. A. U.*, Feb., 1929, p. 173.

15 GREEK DEBT. After failure to reach agreement of the two arbitrators appointed by Greek Government and the International Financial Commission, the President of the Swiss Confederation, M. Moriaud, rendered decision as umpire, on disputed points in regard to administration of old Hellenic external loans. *E. E. P. S.*, Dec. 31, 1928, p. 271.

19 NICARAGUA. Financial plan for Nicaragua, submitted in report to Secretary Kellogg by W. W. Cumberland, made public. Text of report: *U. S. Daily*, Nov. 20–23, 1928.

22 BELGIAN-LUXEMBURG ECONOMIC UNION—CHINA. Preliminary treaty of friendship and commerce signed at Nanking. Text: *Europe*, Jan. 5, 1929, p. 27; *U. S. C. R.*, Jan. 28, 1929, p. 250.

22 BELGIUM—CHINA. Treaty of amity and commerce signed by which Belgium agrees to surrender extraterritoriality. Text: *North China Herald*, Dec. 1, 1928, p. 338; *Times* (London), Nov. 24, 1928, p. 11; *N. Y. Times*, Nov. 30, 1928, p. 9.

26 *to Dec.* 14 ECONOMIC STATISTICS. International conference for unification of economic statistics held at Geneva. Convention signed by 23 of the 41 states represented, including the United States. *Times* (London), Nov. 27–Dec. 15, 1928. *U. S. Daily*, Feb. 4, 1929, p. 1. Report of American delegation. *Press notice*, Feb. 25, 1929.

27 CHINA—ITALY. Trade treaty signed at Nanking. Text: *North China Herald*, Dec. 8, 1928, p. 381; *Europe*, Jan. 5, 1929, p. 28.

28 EGYPT—PERSIA. Agreement signed relative to status of nationals in each country. *E. E. P. S.*, Nov. 30–Dec. 15, 1928, p. 223.

December, 1928

1 OTTOMAN DEBT AGREEMENT. Grand National Assembly of Turkey ratified agreement of June 13, 1928, between Turkish Government and representatives of foreign bondholders. *Times* (London), Dec. 18, 1928, p. 13. Text of law: *E. E. P. S.*, Nov. 30–Dec. 15, 1928, p. 225.

2 HUNGARY—POLAND. Signed treaty of conciliation and arbitration in Warsaw. *B. I. N.*, Dec. 8, 1928.

3 FRANCE—GERMANY. Agreement arranged by exchange of notes respecting reciprocal use of ports of two countries as ports of call for vessels for protection of fisheries. *J. O.*, Dec. 14, 1928, p. 12982.

3 HUNGARY—POLAND. Concessional protocol to existing commercial treaty signed. *U. S. C. R.*, Feb. 11, 1929, p. 377.

3 POLAND—SPAIN. Signed treaty of arbitration and judicial procedure in Madrid. *B. I. N.*, Dec. 8, 1928.

6 *to* Jan. 3, 1929 BOLIVIA—PARAGUAY. Encounter between troops of Bolivia and Paraguay took place at Fort Vanguardia on Dec. 6, as result of old boundary dispute involving Gran Chaco region. A protocol of conciliation was signed in Washington on Jan. 3, constituting a commission on conciliation to treat, within the limits fixed, the situation which provoked severance of diplomatic relations between the two countries. Text: *P. A. U.*, Feb., 1929, p. 125; *U. S. Daily*, Jan. 5, 1929, p. 2.

6–8 PAN AMERICAN COMMERCIAL CONGRESS. Held sessions in New York. *N. Y. Times*, Dec. 9, 1928, p. 22.

6 RUSSIAN DISARMAMENT VIEWS. M. Litvinov sent note to League disarmament committee opposing secret diplomatic negotiations, such as Franco-British understanding. Text: *U. S. Daily*, Jan. 29, 1929, p. 1; *E. E. P. S.*, Nov. 30–Dec. 15, 1928, p. 212.

8 ESTONIA—GERMANY. Signed most-favored-nation commercial treaty. *U. S. C. R.*, Dec. 24, 1928, p. 843. *U. S. Daily*, Dec. 12, 1928, p. 2.

10 CHINESE TARIFF. New schedule of rates promulgated on Dec. 10, effective Feb. 1, 1929. *Cur. Hist.*, Feb., 1929, p. 878. *North China Herald*, Dec. 15, 1928. On Dec. 20, it was announced that tariff treaties had been signed with nine countries: Belgium, Great Britain, Denmark, Italy, Holland, Norway, Portugal, Sweden and the United States. *B. I. N.*, Jan. 5, 1929.

10 *to* Jan. 5 INTERNATIONAL CONFERENCE ON CONCILIATION AND ARBITRATION. Met in Washington, and signed on Jan. 5: (1) General convention of inter-American conciliation, (2) General treaty of inter-American arbitration, (3) Protocol of progressive arbitration. Adopted resolution of conciliation of Bolivia and Paraguay on Dec. 10, and resolution of appreciation on the signing of Bolivia-Paraguay protocol on Jan. 4. Texts: *P. A. U.*, Feb., 1929; *U. S. Daily*, Dec. 11, 1928–Jan. 7, 1929.

10–15 LEAGUE OF NATIONS COUNCIL. 53d session held in Lugano. Principal features: Bolivia-Paraguay dispute, execution of Assembly resolutions, appointment of new

committees, including Committee of Jurists to examine Court statute with view to possible amendments; and committee of three jurists to make survey of subjects to be covered by League in its codification of international law. *L. N. M. S.*, Jan. 15, 1929. *Cmd.* 3270. *L. N. O. J.*, Jan., 1929.

10 RUSSIAN FOREIGN RELATIONS. M. Litvinov submitted report on the international situation to Central Executive Committee of Soviet Union. Text: *E. E. P. S.*, Nov. 30–Dec. 15, 1928, p. 202.

12 CHINA—DENMARK. Signed treaty at Nanking. Text: *North China Herald*, Jan. 5, 1929, p. 3.

12–14 CIVIL AERONAUTICS. International conference held in Washington with 39 nations represented. *U. S. Daily*, Dec. 13, 1928, p. 1. *N. Y. Times*, Dec. 13, 1928, p. 1.

12 *to* Feb. 11 GERMAN REPARATIONS. France and Germany reached agreement on Dec. 12 regarding constitution of Committee of Experts. Text of official communiqué of Dec. 22: *Cur. Hist.*, Feb., 1929, p. 709. Membership of Committee announced. *Times* (London), Jan. 8, 1929, p. 12. First business session of Experts Committee convened in Paris on Feb. 11. Owen D. Young elected chairman. *N. Y. Times*, Feb. 12, 1929, p. 1.

14 LITHUANIA—POLAND. After hearing report of Sr. Quinones de Leon, on Polish-Lithuanian dispute, the Council of the League adopted two resolutions concerning future negotiations by the two countries for peaceful settlement. *L. N. M. S.*, Jan. 15, 1929, p. 412. *Cur. Hist.*, Mar., 1929, p. 1042.

14 OPIUM BOARD. The League of Nations Council appointed eight persons to sit on Permanent Central Opium Board, and replied to communication from United States Government declining to take part in the appointment of the board. *N. Y. Times*, Dec. 15, 1928, p. 12. *L. N. M. S.*, Jan. 15, 1929, p. 416. Text: *Press notice*, Dec. 22, 1928; *U. S. Daily*, Dec. 27, 1928, p. 2.

14 PERMANENT COURT OF INTERNATIONAL JUSTICE. League of Nations Council appointed Commission of Jurists on revision of Court statute. Members: *L. N. M. S.*, Jan. 15, 1929, p. 418.

14 PERSIA—POLAND. Diet of Poland ratified a treaty of friendship and a treaty of commerce with Persia, thus resuming diplomatic relations which had been interrupted for about 200 years. *B. I. N.*, Dec. 22, 1928.

16 HUNGARY—RUMANIA. Conference re "optants" question opened at Albazia. *B. I. N.*, Dec. 22, 1928.

18 BELGIUM—SPAIN. Signed commercial agreement to replace *modus vivendi* of Oct. 26, 1925. *B. I. N.*, Dec. 22, 1928.

18 CHINA—GREAT BRITAIN. New trade treaty signed by which Nanking Government was recognized. Text: *Times* (London), Dec. 28, 1928, p. 11; *Europe*, Jan. 5, 1929, p. 29; *North China Herald*, Dec. 22–29, 1928. Came into force on Feb. 1. *Times* (London), Feb. 1, 1929, p. 11.

19 CHINA—NETHERLANDS. Trade treaty signed at Nanking. *Times* (London), Dec. 22, 1928, p. 10. Text: *North China Herald*, Jan. 5, 1929, p. 3.

19 CHINA—PORTUGAL. Trade treaty signed at Nanking. *Times* (London), Dec. 22, 1928, p. 10. Text: *North China Herald*, Jan. 5, 1929, p. 3.

19 PERSIA—SWEDEN. Signed provisional commercial agreement. *U. S. C. R.*, Jan. 28, 1929, p. 250.

20 CHINA—SWEDEN. Treaty regulating tariff relations signed in Nanking. *U. S. C. R.*, Feb. 25, 1929, p. 504.

20 FRANCE—GREAT BRITAIN. Agreement signed between United Kingdom and Irish Free State and France regarding limits of French fisheries in Granville Bay. Text: *G. B. Treaty Series*, no. 2 (1929), *Cmd.* 3254.

21 BELGIUM—GREAT BRITAIN. Signed agreement to dispense with legalization of certain official documents. Text: *G. B. Treaty Series*, no. 3 (1929), *Cmd.* 3260.

21 GERMANY—RUSSIA. Signed additional protocol to commercial treaty of Oct. 12, 1925, recording agreements on several points regarding trade treaty. *Times* (London), Dec. 24, 1928, p. 9. Text: *Europe*, Feb. 9, 1929, p. 183.

22 CHINA—FRANCE. Tariff treaty signed at Nanking. *Times* (London), Dec. 24, 1928, p. 10. Text: *Europe*, Jan. 5, 1929, p. 31; *North China Herald*, Jan. 5, 1929.

22 PERMANENT COURT OF INTERNATIONAL JUSTICE. Secretary-General of League transmitted to Registrar of the Court the text of report approved by Council on Dec. 13, and resolution adopted on Dec. 14, concerning appointment of jurists' committee to examine statute of the Court with a view to possible amendments. M. Anzilotti and M. Huber accepted invitation of League to work on committee. *L. N. M. S.*, Feb. 15, 1929, p. 15.

26 EGYPT—SWITZERLAND. Provisional commercial treaty, effective Dec. 27, 1928, promulgated in Egypt. *U. S. C. R.*, Feb. 25, 1929, p. 504.

27 CHINA—SPAIN. Signed tariff treaty at Nanking. *B. I. N.*, Jan. 5, 1929. Text in part: *North China Herald*, Jan. 5, 1929.

29 *to* Feb. 9 SOVIET ANTI-WAR PROTOCOL. Soviet Government on Dec. 29, through M. Litvinov, sent proposal to Poland to make Kellogg pact for renunciation of war immediately effective as between Russia, Poland and Lithuania, and attached draft protocol to note. Text of note and protocol and text of note to chairman of League of Nations Preparatory Commission on Disarmament: *Soviet Union R.*, Feb., 1929, p. 30; *N. Y. Times*, Jan. 27, 1929, III, 7. Poland replied on Jan. 10. Representatives of Russia, Latvia, Poland, Estonia and Rumania signed protocol on Feb. 9 in Moscow. Text: *Soviet Union R.*, March, 1929, p. 46; *Times* (London), Feb. 11, 1929, p. 11.

31 GERMANY—UNITED STATES. Signed agreement for extension of time for presentation of American claims against Germany. Text: *U. S. Daily*, Jan. 5, 1929, p. 2; *U. S. Treaty Series*, no. 766.

January, 1929

1 CANADA—UNITED STATES. Arrangement concerning exchange of communications between private wireless experimental stations in United States, its territories and possessions, and Canada, became effective. Text: *U. S. Daily*, Jan. 21, 1929, p. 2; *Press notice*, Jan. 18, 1929.

1 SPAIN—SWITZERLAND. Signed treaty of commerce in Madrid. *B. I. N.*, Jan. 5, 1929.

2 BRAZIL. Declined to serve on Bolivian-Paraguayan Conciliation Commission. Text: *U. S. Daily*, Jan. 7, 1929, p. 2.

2 CANADA—UNITED STATES. Signed convention providing for construction of remedial works in Niagara River above the falls, to conserve beauty of the falls and rapids. Text: *U. S. Daily*, Jan. 3, 1929, p. 1. Text and report from Secretary of State: *Cong. Rec.*, Jan. 21, 1929, p. 2021.

4 AIR TRAFFIC CONFERENCE. Opened in Berlin with representatives from 11 countries. *Times* (London), Jan. 5, 1929, p. 11.

5 ECUADOR—GREAT BRITAIN. Signed commercial travelers agreement effective immediately. *U. S. C. R.*, Feb. 25, 1929, p. 504.

5 *to* Feb. 18 GREAT BRITAIN—PERSIA. On Nov. 26, 1927, Persia protested against terms of Treaty of Jeddah of May 20, 1927, between Great Britain and the Wahabi King in so far as they applied to Island of Bahrein. On Jan. 18, 1928, Sir A. Chamberlain declined to recognize Persian claim. Further Persian notes of Aug. 2, 1928 and Jan. 5, 1929, protested against issuance of instructions by British Government to Persians landing in Bahrein. On Feb. 18, Chamberlain sent note in reply to that of Aug. 2, 1928. Summary: *Times* (London), Mar. 2, 1929, p. 11.

5 HUNGARY—TURKEY. Signed treaty of neutrality, conciliation and arbitration at Budapest. *B. I. N.*, Jan. 19, 1929.

5–6 YUGOSLAVIA DICTATORSHIP. King Alexander issued statement on Jan. 5 and on Jan. 6 dissolved the Skupshtina, suspended the Constitution, and assumed absolute power over the country. *N. Y. Times*, Jan. 6–7, 1929. Text of declaration and manifesto: *Europe*, Jan. 12, 1929, p. 47; *Cur. Hist.*, Feb., 1929, p. 867.

7 ROOT, ELIHU. Accepted membership on Commission of Jurists appointed by League of Nations to study revision of Permanent Court to facilitate American adhesion. *N. Y. Times*, Jan. 8, 1929, p. 1. *U. S. Daily*, Jan. 8, 1929, p. 2.

8 COAL QUESTION. International Commission of experts on coal, representing eleven countries, met at Geneva. *B. I. N.*, Jan. 19, 1929.

10 AUSTRIA—YUGOSLAVIA. Agreement supplementary to commercial treaty, signed July 7, 1928, came into force. *U. S. C. R.*, Feb. 18, 1929, p. 443.

12 EGYPT—PALESTINE. Agreement signed in Paris whereby civil and commercial judgments rendered in one country were executable in the other. *B. I. N.*, Jan. 19, 1929.

14 CHINA—UNITED STATES. Recognition of Chinese Nationalist Government, and legal capacity of China to sue, as result of treaty of July 25, 1928, affirmed in decision of Circuit Court of Appeals for Ninth Circuit in case of China *v.* Merchants Fire Assurance Corporation. Text: *U. S. Daily*, Jan. 25, 1929, p. 8.

14 FINLAND—UNITED STATES. Exchanged ratifications of arbitration and conciliation treaties signed June 7, 1928. *U. S. Daily*, Jan. 17, 1929, p. 2. *U. S. Treaty Series*, nos. 768–769.

15 LATVIA—PERSIA. Signed treaty of friendship. *B. I. N.*, Jan. 19, 1929.

15–19 PERMANENT CENTRAL OPIUM BOARD. Constituted under Geneva Opium Convention of Feb. 19, 1925. Held first session in Geneva. *L. N. M. S.*, Feb. 15, 1929, p. 13.

19 GERMANY—POLAND. Renewed provisional lumber agreement, which expired Dec. 4, 1928. *U. S. C. R.*, Feb. 25, 1929, p. 504.

21 CANADA—UNITED STATES. Arrangement on radio channels at conference in Ottawa approved, to take effect Mar. 1, 1929. *Press notice*, Feb. 28, 1929.

21 CHINA—GERMANY. Exchanged ratifications of commercial agreement signed Aug. 17, 1928. *U. S. C. R.*, Feb. 18, 1929, p. 443.

21 DOMINICAN REPUBLIC—HAITI. Signed treaty fixing boundary between the two countries. *U. S. Daily*, Jan. 25, 1929, p. 2. *B. I. N.*, Feb. 2, 1929.

21 UNITED STATES—YUGLOSLAVIA. Signed arbitration and conciliation treaties. *U. S. Daily*, Jan. 23, 1929, p. 2. *Press notice*, Jan. 21, 1929.

23 COMPACTS BETWEEN STATES. Bills granting consent of Congress to compacts or agreements between New Mexico and Oklahoma; New Mexico, Oklahoma and Texas; New Mexico and Arizona; Colorado and New Mexico; Colorado, Oklahoma and Kansas, passed the Senate. Text of bills: *Cong. Rec.*, Jan. 23, 1929, p. 2183–4. Signed by President Coolidge on March 1. *Public no.* 946–948, 963–964.

23 PERMANENT COURT OF INTERNATIONAL JUSTICE. Counter-cases of both parties in case between France and Switzerland relating to free zones of Savoy and the District of Gex, filed with registry of the Court. *L. N. M. S.*, Feb. 15, 1929, p. 15.

24 ESTONIA—TURKEY. Exchanged ratifications of most-favored-nation commercial treaty signed Mar. 12, 1928. *U. S. C. R.*, Feb. 18, 1929, p. 443.

25 GERMANY—RUSSIA. Signed treaty to submit disputes to joint commission of two Germans and two Russians, which is to meet annually, but may be convoked at any time, to examine conflicts. *N. Y. Times*, Jan. 26, 1929, p. 5. *Times* (London), Jan. 29, 1929, p. 13. Text: *Europe*, Feb. 9, 1929, p. 190; *Soviet Union R.*, March 1929, p. 48.

26 ETHIOPIA—UNITED STATES. Signed arbitration and conciliation treaties. *U. S. Daily*, Jan. 30, 1929, p. 3.

27 ITALY—YUGOSLAVIA. Treaty of friendship signed in Rome Jan. 27, 1924, expired. *Times* (London), Jan. 28, 1929, p. 11.

28 BOLIVIA-PARAGUAY PERMANENT CONCILIATION COMMISSION. Organization of commission provided in protocol of Jan. 3, 1929 completed. Countries represented on commission: United States, Colombia, Cuba, Mexico, Uruguay, Bolivia, and Paraguay. *U. S. Daily*, Jan. 29, 1929, p. 1.

28 HUNGARY—UNITED STATES. Signed conciliation and arbitration treaties. *U. S. Daily*, Jan. 30, 1929, p. 2.

28 LEAGUE OF NATIONS COMMITTEE FOR UNIFICATION OF TRANSPORT STATISTICS. Met in Paris to continue study of inland navigation statistics and maritime navigation statistics. *L. N. M. S.*, Feb. 15, 1929, p. 9.

28 LEAGUE OF NATIONS COMMITTEE OF FIVE ON FIRST CODIFICATION CONFERENCE. Met at Geneva to examine information and opinions furnished by states on three questions: (1) nationality, (2) territorial waters, (3) responsibility of states for damage to person or property of foreigners. *L. N. M. S.*, Feb. 15, 1929, p. 3.

30 FRANCE—YUGOSLAVIA. Signed commercial and navigation convention and a consular agreement. *U. S. C. R.*, Mar. 11, 1929, p. 641.

31 HUNGARY—SPAIN. Mutual most-favored-nation treaty of commerce and navigation came into force. *U. S. C. R.*, Mar. 11, 1929, p. 641.

31 NARCOTICS. The Opium Advisory Committee of League of Nations rejected American plan (Crane scheme) for limitation of manufacture of narcotics. *N. Y. Times*, Feb. 1, 1929, p. 6.

February, 1929

1 AUSTRIA—DENMARK. Commercial treaty of April 6, 1928, came into force. *U. S. C. R.*, Mar. 4, 1929, p. 576.

1 CHINA—JAPAN. Agreement signed whereby Japan acquiesced in application of Chinese tariff schedule for one year. *U. S. Daily*, Feb. 6, 1929, p. 7. *Times* (London), Feb. 1, 1929, p. 11.

5 CHINA—JAPAN. Agreement reached on Tsinan incident. *Times* (London), Feb. 6, 1929, p. 14. *North China Herald*, Feb. 9, 1929.

6 BULGARIA—YUGOSLAVIA. Frontier between the two countries, closed 15 months ago, because of Macedonian revolutionary activities, was opened. *C. S. Monitor*, Feb. 7, 1929, p. 1. *B. I. N.*, Feb. 16, 1929.

10 BULGARIA—GREECE. Signed extradition convention. *B. I. N.*, Feb. 16, 1929.

11 RUMANIAN LOAN. Final contracts signed in Paris for $101,000,000 Rumanian loan for stabilization of currency and rehabilitation of the country. *N. Y. Times*, Feb. 12, 1929, p. 6.

11 TRADE MARK CONFERENCE. Inter-American Trade Mark Conference opened in Washington. Draft of proposed treaty: *U. S. Daily*, Feb. 12–14, 1929, pp. 1–2.

11 VATICAN AGREEMENT. Cardinal Gasparri and Signor Mussolini signed a political treaty, solving and eliminating the Roman question; a concordat regulating conditions of religion and of the church in Italy; a convention which systematizes financial relations between the Holy See and Italy arising out of events of 1870. *Times* (London), Feb. 12, 1929, p. 14. *Cur. Hist.*, Mar., 1929, p. 1032. *N. Y. Times*, Feb. 12, 1929, p. 1.

12 ALBANIA—UNITED STATES. Exchanged ratifications of arbitration treaty signed Oct. 22, 1928. Text: *U. S. Treaty Series*, no. 770.

12 ALBANIA—UNITED STATES. Exchanged ratifications of conciliation treaty signed Oct. 22, 1928. Text: *U. S. Treaty Series*, no. 771.

12 LATVIA—POLAND. Signed treaty of commerce and a railway convention. *B. I. N.*, Feb. 16, 1929.

14 BELGIUM—EGYPT. Existing commercial convention denounced by Egypt. *B. I. N.*, Mar. 2, 1929.

14 EGYPT—GREAT BRITAIN. Existing commercial convention denounced by Egypt. *B. I. N.*, Mar. 2, 1929.

15 NARCOTIC TRAFFIC. State Department made public correspondence by which informal agreements have been reached with 13 nations for action to check traffic in narcotics. Text: *Press notice*, Feb. 15, 1929; *U. S. Daily*, Feb. 18–19, 1929, p. 2.

16 NETHERLANDS—UNITED STATES. Exchange of memoranda concerning reciprocal access to petroleum resources, Mar. 5–July 10, 1928, made public. Text: *Press notice*, Feb. 16, 1929.

INTERNATIONAL CONVENTIONS

ARMS TRAFFIC PROTOCOL ON CHEMICAL WARFARE. Geneva, June 17, 1925.
Ratification: Belgium and Egypt. *B. I. N.*, Jan. 19, 1929.

BONES EXPORT. Geneva, July 11, 1928.
Signatures: L. N. O. J., Dec., 1928, p. 1936.

BULGARIAN STABILIZATION. Protocol. Geneva, Mar. 10, 1928.
Ratification: Bulgaria. June 4, 1928. *L. N. O. J.*, Dec., 1928, p. 1937.

BULGARIAN STABILIZATION. Protocol. Geneva, Mar. 10, 1928. Additional Act.
Ratification: Bulgaria. Nov. 3, 1928. *L. N. O. J.*, Dec., 1928, p. 1937.

ECONOMIC STATISTICS. Convention and Final Act. Geneva, Dec. 14, 1928.
Signatures of 23 states: Times (London), Dec. 15, 1928, p. 9.
United States. *U. S. Daily*, Feb. 4, 1929, p. 1.

GREEK REFUGEES. Protocol for further settlement. Geneva, Sept. 15, 1927.
Ratification: Greece. Jan. 12, 1928. *L. N. O. J.*, Dec., 1928, p. 1924.

INTER-AMERICAN ARBITRATION TREATY. Washington, Jan. 5, 1929.
Signatures and text: U. S. Daily, Jan. 4, 1929, p. 2; *P. A. U.*, Feb., 1929, p. 118; supplement to this JOURNAL, p. 82.

INTER-AMERICAN CONCILIATION CONVENTION. Washington, Jan. 5, 1929.
Signatures and text: U. S. Daily, Jan. 5, 1929, p. 2; *P. A. U.*, Feb., 1929, p. 114; supplement to this JOURNAL, p. 76.
Ratification: United States. Feb. 20, 1929. *Cong. Rec.*, Feb. 20, 1929, p. 3967.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.
Ratification: Chile. July 30, 1928. *P. A. U.*, Feb., 1929, p. 174.

MINIMUM-WAGE-FIXING MACHINERY. Convention and recommendation. Geneva, June 16, 1928.
L. N. O. J., Dec., 1928, p. 1901. *I. L. O. B.*, July 31, 1928.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.
Came into force, Sept. 25, 1928. *G. B. Treaty Series*, no. 27 (1928), *Cmd.* 3244.

PAN AMERICAN ARBITRATION. Santiago, May 3, 1923.
Promulgation: Mexico. *D. O.* (Mexico), Aug. 7, 1928. *P. A. U.*, Dec., 1928, p. 1258.
Ratification:
Guatemala. Aug. 15, 1928. *P. A. U.*, Jan., 1929, p. 65.
Peru. Oct. 23, 1928. *P. A. U.*, Feb., 1929, p. 175.
Ecuador. Mar. 9, 1929. *C. S. Monitor*, Mar. 11, 1929, p. 3.

PAN AMERICAN CONFERENCE ON CONCILIATION AND ARBITRATION. Final Act, Jan. 5, 1929.
Text: Supplement to this JOURNAL, p. 89.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924. Additional Protocol. Lima, Oct. 19, 1927.
Ratification: Uruguay and Panama. *P. A. U.*, Feb., 1929, p. 175.

POSTAL CONVENTION AND PROTOCOL. Mexico. Nov. 9, 1926.
Ratification: Guatemala. June 15, 1928. *P. A. U.*, Jan., 1929, p. 65.

PRIVATE INTERNATIONAL LAW. Havana, Feb. 13, 1928.
Ratification deposited: Panama. Oct. 26, 1928. *P. A. U.*, Feb., 1929, p. 174.

PROGRESSIVE ARBITRATION PROTOCOL. Washington, Jan. 5, 1929.
Signatures and text: P. A. U., Feb., 1929, p. 123.

RADIOTELEGRAPH CONVENTION. Washington, Nov. 25, 1927.
Ratification: Hungary. *U. S. Daily*, Feb. 21, 1929, p. 2.
Ratification: United States. Oct. 8, 1928.
Text: U. S. Treaty Series, no. 767.
Ratifications deposited:
Belgium. Dec. 15, 1928. *Press notice*, Dec. 15, 1928.
Italy. Jan. 18, 1929. *U. S. Daily*, Jan. 21, 1929, p. 11.
Japan, Spain, Great Britain. Jan. 31, 1929. *Press notice*, Jan. 31, 1929.
Came into force, Jan. 1, 1929; *U. S. Daily*, Jan. 3, 1929, p. 2. *Press notice*, Dec. 31, 1928.

RELIEF UNION. Geneva, June 12, 1927.
Ratification: Great Britain. Jan. 10, 1929. *B. I. N.*, Jan. 19, 1929.

RENUNCIATION OF WAR. Paris, Aug. 27, 1928.
Adhesions deposited:
Afghanistan, Dominican Republic, Ethiopia, Russia, Austria, Siam.
Ratifications:
Haiti, Liberia, Paraguay, Portugal, Cuba, Panama, Albania. *Press notice*, Jan. 17, 1929.
United States. Jan. 17, 1929. *U. S. Daily*, Jan. 18, 1929, p. 1–2.
Ratifications deposited, Mar. 2, 1929:
Germany, United States, Great Britain, and Northern Ireland, etc., Canada, Australia, New Zealand, South Africa, Irish Free State, India, Italy, Czechoslovakia. *Press notice*, Mar. 2, 1929.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.
Ratification: United States (with reservation), Feb. 25, 1929. *U. S. Daily*, Feb. 26, 1929, p. 3.
Text: Cong. Rec., Feb. 25, 1929, p. 4311.

TANGIER STATUTE. Final Protocol. July 25, 1928.
Adhesion: Belgium. *Times* (London), Jan. 16, 1929, p. 11.
Came into force, Jan. 15, 1929: *B. I. N.*, Jan. 19, 1929.

TRAFFIC REGULATION. Paris, April 24, 1926.
Ratification: Uruguay. Oct. 10, 1928. *P. A. U.*, Feb., 1929, p. 175.

UNIVERSAL POSTAL CONVENTION. Stockholm, Aug. 28, 1924.
Ratification: Colombia. Oct. 11, 1928. *P. A. U.*, Feb., 1929, p. 174.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

SUPREME COURT OF THE UNITED STATES

JORDAN *v.* TASHIRO

November 19, 1928

Obligations of treaties should be liberally construed to effect the apparent intention of the parties to secure equality and reciprocity between them. Where a treaty admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred.

The treaty of commerce and navigation between the United States and Japan authorizes citizens of Japan to carry on trade within the United States and "to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Held that this includes the operation of a hospital as a business undertaking, the leasing of land for that purpose, and the exercise of these privileges through a corporate agency. 201 Cal. 236, affirmed.

Mr. Justice STONE delivered the opinion of the court.

The respondents, subjects of Japan residing in California, presented for filing in the office of the Secretary of State of California, one of the petitioners, proposed articles of incorporation of the "Japanese Hospital of Los Angeles." The articles provided for the creation of a business corporation with a share capital of $100,000. They purported to authorize the corporation to construct and operate in Los Angeles a general hospital with a home for nurses and resident physicians, and to lease land for that purpose.

Although the articles complied with all provisions of the California statutes governing the organization of a corporation for such purposes, the petitioners refused to file them on the ground that, as the respondents were citizens of Japan, the Alien Land Law of the State did not permit an incorporation by them for the purposes named. The respondents then brought, in the Supreme Court of California, a proceeding in mandamus to compel the petitioners to file the proposed articles and to issue a certificate of incorporation to the hospital. The mandamus petition set up that the Treaty of Commerce and Navigation between the Government of the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504, and now in force, conferred on citizens and subjects of the Empire of Japan the right to incorporate in the United States for the purposes named in the proposed articles.

The State court granted the writ as prayed, basing its determination on the construction of the treaty. Tashiro *v.* Jordan, 73 Calif. Dec. 635, Number 3877. This court granted the petition of the Secretary of State of California for certiorari, May 14, 1928.

Section 2 of the Alien Land Law of California, as amended by the Act of the Legislature, approved June 20, 1923, Stats. 1923, p. 1020, provides

that aliens of a class in which respondents are included may acquire, possess and enjoy real estate within the state "in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise." Section 3, in like terms, permits, (a) acquisition of land by a corporation, the majority of whose stockholders are aliens, and (b) the purchase by aliens of stock in corporations owning or leasing land, only for purposes prescribed by such a treaty.

The statutes of California do not otherwise forbid the organizing of a corporation by citizens of Japan residing in the state, and by these enactments there was effected perfect harmony in the operation of the statute and of the treaty. What the treaty prescribes the statute authorizes. There is thus no possibility of conflict between the exercise of the treaty making power of the federal government and the reserved powers of the state such as that suggested in Geofroy *v.* Riggs, 133 U. S. 258, 267, on which petitioners placed reliance on the argument.

The Supreme Court of California, in passing upon the application for mandamus, granted the relief prayed, not as a matter of statutory construction, but because it thought the conduct of a hospital by Japanese citizens through the instrumentality of a corporation, organized under the laws of the state, was a privilege secured to the respondents by the treaty which the state statute did not purport to withhold. The privilege challenged by petitioners is one specially set up or claimed under a treaty of the United States and sustained by the state court and the case is thus one within the jurisdiction of this court conferred by §237 (b) of the Judicial Code. Compare Red Cross Line *v.* Atlantic Fruit Co., 264 U. S. 109, 120.

The question presented is one of the construction of the treaty, the relevant portions of which are printed in the margin.[1] It in terms authorizes the citizens of Japan to carry on trade within the United States and "to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

[1] Treaty of commerce and navigation between the United States and Japan . . . ARTICLE I. The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . .

The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects. . . .

The petitioners insist that the construction and operation of a hospital is not one of the purposes prescribed by the treaty, which, it is argued, are limited so far as "trade" and "commerce" are concerned to the purchase and sale or exchange of goods and commodities, and that, in any case, the treaty does not confer upon Japanese subjects, resident in California, the privilege of forming a corporation under the laws of California or of leasing lands through a corporate agency for such a purpose.

The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. See Geofroy *v.* Riggs, *supra;* Tucker *v.* Alexandroff, 183 U. S. 424, 437; Wright *v.* Henkel, 190 U. S. 40, 57; *In re* Ross, 140 U. S. 453, 475. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. Asakura *v.* Seattle, 265 U. S. 332; Tucker *v.* Alexandroff, *supra;* Geofroy *v.* Riggs, *supra.*

While in a narrow and restricted sense the terms "commerce," or "commercial," and "trade" may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. Asakura *v.* Seattle, *supra.* And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse. See Gibbons *v.* Ogden, 9 Wheat. 1, 189.

Considerations which led this court to conclude that the terms "trade" and "commerce" as used in this treaty do not include agriculture, and the circumstances attending the making of the treaty which were deemed to exclude from the operation of its broad language any grant of the privilege of acquiring and using lands within the United States for agricultural purposes, were discussed in the opinions in Terrace *v.* Thompson, 263 U. S. 197, 223; Webb *v.* O'Brien, 263 U. S. 313, 323; Frick *v.* Webb, 263 U. S. 326, 333, and need not now be detailed. But in Asakura *v.* Seattle, *supra,* it was held that the language of this treaty securing to Japanese citizens the privilege of carrying on trade within the United States was broad enough to comprehend all classes of business which might reasonably be embraced in the word "trade," and included the privilege of carrying on the business of a pawnbroker. In Clarke *v.* Deckebach, 274 U. S. 392, 396, in considering the treaty with Great Britain of July 3, 1815, 8 Stat. 228; August 6, 1827, 8 Stat. 361, granting reciprocal liberty of commerce between the United States and Great Britain, and in holding that the guarantee that " . . . the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce," did not extend to a

British subject engaged in keeping a poolroom within the United States, we took occasion to point out that the language of the present treaty with Japan was of broader scope than that then before the court.

Giving to the terms of the treaty, as we are required by accepted principles, a liberal rather than a narrow interpretation, we think, as the state court held, that the terms "trade" and "commerce," when used in conjunction with each other and with the grant of authority to lease land for "commercial purposes" are to be given a broader significance than that pressed upon us, and are sufficient to include the operation of a hospital as a business undertaking; that this is a commercial purpose for which the treaty authorizes Japanese subjects to lease lands.

It is said that the elimination from the original draft of this clause of the treaty of words authorizing the leasing of land for "industrial, manufacturing and other lawful" purposes (see Terrace *v.* Thompson, *supra*, p. 223) leads to the conclusion that land might not be leased for hospital purposes by Japanese subjects, even though under the other provisions of the treaty they might be permitted to operate such an institution. But as the leasing of land for a hospital is obviously not for an industrial or manufacturing purpose, this argument presupposes that the phrase "commercial purposes" is limited to merchandising businesses, which for reasons already stated we deem inadmissible. Moreover, a construction which concedes the authority of Japanese subjects to operate a hospital but would deny to them an appropriate means of controlling so much of the earth's surface as is indispensable to its operation, does not comport with a reasonable, to say nothing of a liberal, construction. The Supreme Court of California has reached a like conclusion in State of California *v.* Tagami, 195 Cal. 522, holding that this treaty secured to a Japanese subject the privilege of leasing land within the state for the purpose of using and occupying it for the maintenance of a health resort and sanitarium.

The contention that the treaty does not permit the exercise of the privileges secured by it through a corporate agency requires no extended consideration. The employment of such an agency is incidental to the exercise of the granted privilege. But it is not an incident which enlarges the privilege by annexing to the permitted business another class of business otherwise excluded from the grant, as would have been the case in Terrace *v.* Thompson, *supra*, had the business of farming been deemed an incident to the business of trading in farm products.

The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise. Especially would this be the case where the granted privileges relate to trade and commerce and the use of land for commercial purposes. It would be difficult to select any single agency of more universal use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the business

corporation. And it would, we think, be a narrow interpretation indeed which, in the absence of restrictive language, would lead to the conclusion that the treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form. But here any possibility of doubt would seem to be removed by the clause which confers on citizens and subjects of the high contracting parties the right " . . . to do anything generally incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Affirmed.

NIELSEN *v.* JOHNSON

February 18, 1929

By the Code of Iowa, the estate of a decedent passing to his mother, if an alien non-resident of the United States, is subject to an inheritance tax of 10%, but an estate of less than $15,000 passing to a parent who is not such a non-resident alien is tax free. The intestate, a citizen of the Kingdom of Denmark, residing in Iowa, died there, leaving his mother, a resident and citizen of Denmark, his sole heir at law and entitled by inheritance, under the laws of Iowa, to his net estate of personal property. In the proceedings in the State court for fixing the inheritance tax, petitioner asserted that the provisions of the statutes referred to, so far as they authorized a tax upon this decedent's estate, were void as in conflict with Article 7 of the treaty of 1826 between the United States and Denmark, providing that no higher taxes shall be levied in the territories of either party upon any personal property of their respective citizens on its removal from their territories, either upon inheritance or otherwise, than shall be payable in each state respectively when such property is removed by a citizen thereof.

That there is a discrimination based on alienage is evident, since the tax is imposed only when the non-resident heirs are also aliens. The history of Article 7 and reference to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its purpose was both to relieve the citizens of each country from onerous tax upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs.

That the present discriminatory tax is the substantial equivalent of the *droit de détraction*, which was the precursor of the modern inheritance tax, is not open to doubt. That it was the purpose of the high contracting parties to prohibit discriminatory taxes of this nature clearly appears from the diplomatic correspondence preceding and subsequent to the execution of the treaty. Also, the language of Article 7, interpreted with that liberality demanded for treaty provisions, sufficiently expresses this purpose.

Mr. Justice STONE delivered the opinion of the court.

This case is here on certiorari, granted June 4, 1928, 277 U. S. 583, under §237 of the Judicial Code, to review a judgment of the Supreme Court of Iowa affirming a judgment of the Plymouth District Court imposing an inheritance tax on the estate of petitioner's intestate. Anders Anderson, the intestate, a citizen of the Kingdom of Denmark residing in Iowa, died there February 9, 1923, leaving his mother, a resident and citizen of Denmark, his sole heir at law and entitled by inheritance, under the laws of Iowa, to his net estate of personal property, aggregating $3,006.37. By §7315, Code of Iowa (1927), c. 351, the estate of a decedent passing to his mother or other named close relatives, if alien non-residents of the United States, is subject to an inheritance tax of 10%, but by §7313 an estate of less

than $15,000, as was decedent's, passing to a parent who is not such a non-resident alien is tax free. In the proceedings in the state court for fixing the inheritance tax, petitioner asserted that the provisions of the statutes referred to, so far as they authorized a tax upon this decedent's estate, were void as in conflict with Article 7 of the treaty of April 26, 1826, between the United States and Denmark, 8 Stat. 340, 342, renewed in 1857, 11 Stat. 719, 720, reading as follows:

> ARTICLE 7. The United States and his Danish Majesty mutually agree, that no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively.

The Supreme Court of Iowa, 218 N. W. 140, following its earlier decision, *In re* Estate of Pedersen, 198 Iowa 166, upheld the statute as not in conflict with the treaty.

In Peterson *v.* Iowa, 245 U. S. 170, this court held, following Frederickson *v.* Louisiana, 23 How. 445, that Article 7 was intended to apply only to the property of citizens of one country located within the other and so placed no limitation upon the power of either government to deal with its own citizens and their property within its own dominion. Hence, it did not preclude the inheritance tax there imposed upon the estate of a resident citizen of Iowa at a higher rate upon legacies to a citizen and resident of Denmark than upon similar legacies to citizens or residents of the United States. The court said (p. 172):

> Conceding that it [Article 7] requires construction to determine whether the prohibitions embrace taxes generically considered, or death duties, or excises on the right to transfer and remove property, singly or collectively, we are of the opinion that the duty of interpretation does not arise since in no event would any of the prohibitions be applicable to the case before us.

But, in the present case, the decedent was a citizen of Denmark, owning property within the State of Iowa, and Article 7, by its terms, is applicable to charges or taxes levied on the personal property or effects of such a citizen; hence its protection may be invoked here if the discrimination complained of is one embraced within the terms of the treaty.

That there is a discrimination based on alienage is evident, since the tax is imposed only when the non-resident heirs are also aliens. But it is argued by respondent, as the court below held, that the present tax is not prohibited by the treaty since it is one upon succession, *In re* Estate of Thompson, 196 Iowa, 721, *In re* Meinert Estate, (Iowa) 213 N. W. 938, and not on property or its removal which, it is said, is alone forbidden; and

that in any case since the only tax discrimination aimed at by Article 7 in cases of inheritance is that upon the power of disposal of the estate and not the privilege of succession, the particular discrimination complained of is not forbidden, for the statutes of Iowa permit a citizen of Denmark to dispose of his estate to citizens and residents of Denmark on the same terms as a citizen of Iowa to like non-resident alien beneficiaries.

The narrow and restricted interpretation of the treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. Jordan *v.* Tashiro, No. 13, October Term, 1928, 49 Sup. Ct. 47; Geofroy *v.* Riggs, 133 U. S. 258, 271; *In re* Ross, 140 U. S. 453, 475; Tucker *v.* Alexandroff, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred. Asakura *v.* Seattle, 265 U. S. 332; Tucker *v.* Alexandroff, *supra;* Geofroy *v.* Riggs, *supra,* and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See Ware *v.* Hylton, 3 Dall. 199; Jordan *v.* Tashiro, *supra,* cf. Cheung Sum Shee *v.* Nagle, 268 U. S. 336. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. *In re* Ross, *supra,* at 467; United States *v.* Texas, 162 U. S. 1, 23; Kinkead *v.* United States, 150 U. S. 425, 486; Terrace *v.* Thompson, 263 U. S. 197, 223.

The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs, as suggested by this court in Peterson *v.* Iowa, *supra,* p. 174, and also to extend like protection to alien heirs of the non-citizen.

On March 5, 1824, Mr. Pedersen, Minister of Denmark to the United States, presented to John Quincy Adams, Secretary of State, a project of convention for the consideration of this government. This project dealt with the commercial relations between the two countries and their territories and the appointment of consular officers, but did not contain any provisions corresponding to Article 7. On January 14, 1826, certain citizens of the United States addressed to Henry Clay, then Secretary of State, a memorial complaining of certain taxes, imposed by the Danish Government with

respect to property of citizens of the United States located in the Danish West Indies, known as "sixths" and "tenths," the former being one-sixth of the value of the property, payable to the crown, and the latter a further one-tenth of the residue, payable to the town or county magistrate, as a prerequisite to removal of property from the islands. Both taxes were imposed on the property inherited by an alien heir. Danish Laws, Code of Christian V, Book V, c. 2, §§ 76, 77, 78, 79. The memorial prayed that an article be inserted in the treaty then contemplated with Denmark, comparable to the similar provisions of existing treaties between Denmark and Great Britain and Denmark and France, forbidding the imposition of taxes of this character.

Previously, on November 7, 1825, Mr. Clay had addressed a note to the Minister of Denmark, setting forth the conditions under which the United States would be disposed to proceed with negotiations. 3 *Notes to Foreign Legations*, 451. The note included, in numbered paragraphs, certain proposals which the Government of the United States desired to have considered in connection with the draft convention submitted by the Danish Minister. Paragraph 5 was as follows:

> When citizens or subjects of the one party die in the country of the other, their estates shall not be subject to any *droit de détraction*, but shall pass to their successors, free from all duty.

In a letter of April 14, 1826, shortly before the execution of the treaty, the Danish Minister transmitted to Mr. Clay a copy of what he termed "the additional Article to the late Convention between Denmark and Great Britain respecting the mutual abolition of the *droit de détraction*." This article, dated June 16, 1824, is substantially in the phraseology of Article 7 of the present treaty between the United States and Denmark.[1]

In the communication of Mr. Clay to the Danish Chargé d'Affaires of November 10, 1826, following the ratification of the treaty, referring to Article 7, he said: "The object which the government of the United States had in view in that stipulation, was to secure the right of their citizens to bring their money and movable property home from the Danish islands, free from charges or duties and especially from the onerous law, known in those islands, under the denominations of sixths and tenths. This object was

[1] "Their Britannick and Danish Majesties mutually agree, that no higher or other Duties shall be levied, in either of Their Dominions . . . upon any personal property of Their respective Subjects, on the removal of the same from the Dominions of Their said Majesties reciprocally, (either upon the inheritance of such property, or otherwise,) than are or shall be payable in each State, upon the like property, when removed by a Subject of such State, respectively." 12 British and Foreign State Papers, 1824–1825 (1826) 49. Article 40 of the Treaty of Commerce and Navigation, concluded between France and Denmark, August 23, 1742, provided that the citizens of each of the two countries reciprocally should be exempt in the other from the *droit d'aubaine* or other similar disability, under whatever name, and that their heirs should succeed to their property without impediment. 1 Coercq, *Recueil des Traités de la France* (1864) 57.

distinctly known to Mr. Pedersen, throughout the whole of the negotiation, and was expressly communicated by me to him in writing." In the reply of the following day, the Danish Chargé d'Affaires stated: "I have been authorized . . . to declare to you, that measures have been taken accordingly by the Danish Government, to secure the due execution of the 7th Article of the Convention, conformably to the intent and meaning thereof as by you stated. . . ."

The *droit de détraction*, referred to in the communication of Mr. Clay of November 7, 1825, and in the note of the Danish Minister of April 14, 1826, in which he identified that phrase with the tax prohibited by the additional article of the treaty between Denmark and Great Britain of June 16, 1824, similar in terms to the article now before us, was a survival from medieval European law of a then well recognized form of tax, imposed with respect to the right of an alien heir to acquire or withdraw from the realm the property inherited.[2] Although often referred to as a tax on property or its withdrawal, the *droit de détraction* seems rather to have been a form of inheritance tax, but one which, because of its imposition only with respect

[2] The *droit de détraction* was derived from the *droit d'aubaine*, one of the many harsh feudal laws and customs directed against strangers and which, in its narrowest sense, was the right of the sovereign, as successor of the feudal lords, to appropriate all the property of a non-naturalized alien dying, either testate or intestate, within the realm. 1 Calvo, *Dictionnaire de Droit International* (1885) 67, Aubaine; 1 Merlin, *Répertoire de Jurisprudence* (5th Ed. 1827) 523, Aubaine; Halleck, International Law (1861) 155; 2 Ferriere, *Oeuvres de Bacquet* (1778) 8, *et seq.* This right was exercised to the exclusion of all heirs whether they were citizens or aliens or resided within or without the realm, with the single exception of resident legitimate offspring, and continued to be exercised long after aliens had been accorded unrestricted power of disposition of goods *inter vivos*. Demangeat, *Historie de la Condition Civile des Étrangers en France* (1844) 110, 125; Loisel, *Institutes Contumiers*, Liv. 1, *règle* 50. The term has, however, sometimes been applied to all the varying disabilities of aliens, Fiore, *Le Droit International Privé* (1907) 14, and more often used to include not only the inability of the alien to transmit but the complementary incapacity of an alien to inherit, even from a citizen. Merlin, *supra*, Aubaine.

But commercial expediency led, at an early date, to a mitigation of the rigors of the *droit d'aubaine*. This process took several forms, the exemption of alien merchants in certain trading centers, of certain classes of individuals (ex-soldiers, etc.) and, most prominently, treaties providing for its reciprocal abandonment or contraction. In these treaties, the *droit de détraction* was recognized as a tax, of from five to twenty, usually ten, per cent of the value, imposed on the right of an alien to acquire by inheritance (testate or intestate) the property of persons dying within the realm. Demangeat, *supra*, at 219, 225; 2 Massé, *Le Droit Commercial* (1844) 14; 1 Calvo, *supra, Détraction;* Fuzier-Herman, *Répertoire Général Alphabétique du Droit Francaise* (1890) *Aubaine*, 6; Guyot, *Répertoire de Jurisprudence* (1785) Détraction; Merlin, *supra, Détraction*. Oppenheim, International Law (4th Ed. 1928) 560; Halleck, *supra*, at 155; Wheaton, Elements of International Law (8th Ed. 1866) 138. The *droit d'aubaine* and the *droit de détraction* were abolished in France by decrees of the Assembly in 1790 and 1791, but subsequently reappeared in the Civil Code, Arts. 726, 912, with provision for abandonment as to a nation according similar treatment to French nationals. They were again abolished, with certain protective provisions for French heirs, by the Law of July 14, 1819. See Dalloz, *Répertoire Pratique* (1825) *Succession;* Demangeat, *supra*, at 239, *et seq;* and citations, *supra*.

to property of aliens who normally removed it from the realm, was sometimes associated with the removal rather than the inheritance of the property. It was limited to inheritances, existed with and supplemented other taxes, the *droit de retraite* or the *droit de sortie*, imposed on the removal of property other than inheritances, Guyot, *Répertoire de Jurisprudence* (1785) *Sortie;* Calvo, *Dictionnaire du Droit International* (1885) *Détraction;* Oppenheim, International Law (4th Ed. 1928) 559, and was, in most cases, applied regardless of the subsequent disposition of the property. Merlin, *Répertoire de Jurisprudence* (5th Ed. 1827) *Détraction;* Guyot, *supra, Détraction.* Its origin and an examination of the commentators likewise leave no doubt that the *droit de détraction*—the tax—accrued upon the death of the decedent, and only after it had been collected was the heir entitled to take possession of the property and remove or otherwise dispose of it.[3] It was thus the precursor of the modern inheritance tax, differing from it in its essentials solely in that it was levied only where one of the parties to the inheritance was an alien or non-resident.[4]

That the present discriminatory tax is the substantial equivalent of the *droit de détraction* is not open to doubt. That it was the purpose of the high contracting parties to prohibit discriminatory taxes of this nature clearly appears from the diplomatic correspondence preceding and subsequent to the execution of the treaty, although the "sixths and tenths" tax, with which the parties were immediately concerned, was a removal tax.

We think also that the language of Article 7, interpreted with that liberality demanded for treaty provisions, sufficiently expresses this purpose. It is true that the tax prohibited by the treaty is in terms a tax on property or on its removal, but it is also true that the modern conception of an inheritance tax as a tax on the privilege of transmitting or succeeding to property of a decedent, rather than on the property itself, was probably unknown to the draftsmen of Article 7. But whatever, in point of present day legal theory, is the subject of the tax, it is the property transmitted which pays it, as the Iowa statute carefully provides.[5] In the face of the

[3] "C'est un droit par lequel le souverain distrait à son profit une certaine partie de succession qu'il permet aux étrangers de venir receueiller dans ses états." 4 Merlin, *supra,* 518, *Détraction;* Guyot, *supra, Détraction.* "Ce droit . . . consistait dans un prélèvement opéré par le gouverment . . . sur le produit net des successions transférés à l'étranger." Calvo, *supra, Détraction;* see also Fuzier-Herman, *Répertoire Général du Droit Française* (1890) *Aubaine,* 6.

[4] A number of early treaties of the United States clearly recognize this essential characteristic of the *droit de détraction,* either by providing in terms for the abolition of both removal duties and the *droit de détraction,* cf. Treaties with: France of 1778, 2 R. S. 203, 206; Wurttemberg of 1844, 2 R. S. 809; Saxony of 1845, 2 R. S. 690; or by words of similar import. Cf. Treaties with: France of 1853, 2 R. S. 249, 251; Switzerland of 1850, 2 R. S. 748, 749, 750; Honduras of 1864, 2 R. S. 426, 428; Great Britain of 1900, 31 Stat. 1939.

[5] "The tax shall be and remain a legal charge against and a lien upon such estate, and any and all the property thereof from the death of the decedent owner until paid." Iowa Code (1927) c. 351, §7306. See also §§7309, 7363.

broad language embracing "charges, or taxes of any kind . . . upon any personal property . . . on the removal of the same . . . either upon the inheritance of such property . . . or otherwise," the omission, at that time, of words more specifically describing inheritance taxes as now defined, can hardly be deemed to evidence any intention not to include taxes theoretically levied upon the right to transmit or inherit, but which nevertheless were to be paid from the inheritance before it could be possessed or removed. Moreover, while it is true that the tax is levied whether the property is actually removed or not, it is, nevertheless, imposed only with respect to a class of persons who would normally find it necessary so to remove the property in order to enjoy it, and since payment of the tax is a prerequisite to removal, the tax is, in its practical operation, one on removal. In the light of the avowed purpose of the treaty to forbid discriminatory taxes of this character, and its use of language historically deemed to embrace them, such effect should be given to its provisions.

The contention that the present discrimination is not one forbidden by the language of Article 7, since the decedent's power of disposal is the same as that of a citizen, leaves out of consideration both the nature of the tax contemplated by the contracting parties and the fact that the treaty provisions extend explicitly to the withdrawal of such property by the alien heir upon inheritance and, as already pointed out, protect him in his right to receive his inheritance undiminished by a tax which is not imposed upon citizens of the other contracting party.

Reversed.

WAR CLAIMS ARBITER

FUNCTIONING UNDER THE SETTLEMENT OF THE WAR CLAIMS ACT OF 1928

CLAIMS FOR SHIPS SEIZED IN CUBAN PORTS

[Norddeutscher Lloyd (Docket No. 104); Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (Docket No. 105); Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (Docket No. 106); Flensburger Dampfercompanie (Docket No. 109) *v.* United States of America.]

December 3, 1928

The question presented is, Was title to the four ships, for the value of which awards are sought, "taken by or on behalf of the United States under authority of the joint resolution of May 12, 1917" within the meaning of the Settlement of War Claims Act of 1928? If not, the claims do not fall within the jurisdiction of the Arbiter.

The Arbiter finds that the four ships here involved were seized by the Cuban Government; that the United States never claimed, took, or held title to these ships, but they were at all times, so far as the United States was concerned, Cuban vessels borrowed for use during the war, and returned to Cuba before the termination of the war between the United States and Germany; and that the Congress, after considering the claims for the value and/or use of these particular ships, advisedly excluded them from the Act.

PARKER, *Arbiter*, rendered the following decision:

These four cases are before the Arbiter on motions to dismiss, filed on

behalf of the Government of the United States. The basis of the motions is that title to the four ships, for the value of which claims are here asserted, was never taken by or on behalf of the United States under the authority of the joint resolution of the Congress of the United States of May 12, 1917, and that therefore the claims do not fall within the jurisdiction of the Arbiter.

The facts disclosed by the records are these:

(1) On April 7, 1917, the Republic of Cuba declared the existence of a state of war between it and Germany.

(2) The four German-owned ships involved in these claims (hereinafter referred to as "the ships"), viz., the *Olivant*, the *Bavaria*, the *Constantia*, and the *Adelheid*, had long prior to April 7, 1917, sought refuge in Cuban ports.

(3) Upon the declaration of the existence of a state of war between Cuba and Germany the German crews of the ships "began to commit hostile acts with intent to destroy" them[1] and, in order to prevent their total destruction and the consequent serious obstruction of the ports where they lay, the Government of Cuba, in pursuance of a decree, seized and held them. The nature of the title, if any, which Cuba acquired in these ships and how such title, if any, was acquired is not made clear by the records. A telegram dated August 21, 1917, from the American Minister accredited to Cuba to the Department of State of the United States at Washington recited that the ships had been seized by Cuba as prizes of war. A decree of the President of Cuba dated August 22, 1917, in effect asserted Cuba's right to sell or otherwise dispose of them. It is entirely clear that, at the time this telegram was sent and this decree promulgated, the ships had been seized by Cuba, that they were then in her possession, and that she was treating them as her own.

(4) On August 22, 1917, in pursuance of a formal decree of that date signed by the President of the Republic of Cuba the ships were formally delivered to the United States, represented by its Envoy Extraordinary and Minister Plenipotentiary accredited to Cuba. The presidential decree recited that the ships should be delivered "to the Government of the United States of America for use by that allied nation for common good in the prompt and victorious termination of the war" instead of being sold by Cuba for commercial purposes in pursuance of offers to purchase made by "various financially capable entities."

(5) In pursuance of the presidential decree a formal document dated August 22, 1917, evidencing the loan of the ships by Cuba to the United States was executed in duplicate by the United States Minister and the Cuban Secretary of War and Navy. Delivery of the ships was accepted by the Government of the United States in order that it "may use them for the purposes of the war which it likewise wages against the Imperial German Government."

[1] Decree of President of Cuba (translation), No. 1157, August 22, 1917, referred to *post*.

(6) On January 28, 1920, the United States Shipping Board adopted a formal resolution with respect to the ships reading:

> Whereas, the Republic of Cuba on August 22, 1917, turned over to the United States the ex-German vessels *Bavaria*, *Olivant*, *Adelheid* and *Constantia* for use by the United States "for the common good in the prompt and victorious termination of the war"; and
>
> Whereas, the purpose for which said vessels were loaned to the United States has been accomplished and the Cuban Government has expressed a desire to take them back;
>
> Now, Therefore, Be It Resolved, that the Director of Operations be and he is hereby authorized and directed to redeliver, in good condition, said vessels to the Cuban Government at such time and place as may be agreed upon.

(7) In pursuance of this resolution the ships were, during the months of February and March, 1920, redelivered by the Government of the United States in the port of Havana to the Government of Cuba, since which time the Government of the United States has had no possession or use of them.

(8) The joint Resolution adopted by the Congress of the United States and approved by the President May 12, 1917, authorized the President—

> to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof . . . which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken.

In pursuance of this joint resolution the President from time to time issued executive orders taking over to the United States the possession and title of German vessels named and described in such orders.

(9) In a memorandum prepared by the Chief of Naval Operations of the United States Navy Department dated November 19, 1919, attention was called to the fact that no executive order had been issued formally taking over to the United States the possession and title of nine ships listed therein, not including any of the four ships involved in these claims. After listing the nine ships in question the memorandum added: "Probably there are other vessels in regard to which no action has been taken confirming possession and title." Based on this memorandum and on the suggestion of the United States Shipping Board concurred in by the Navy Department of the United States, the President of the United States on November 24, 1919, issued a blanket executive order quoting in full the joint resolution of May 12, 1917, and reciting that from time to time during the period of the war—

> vessels which were at the time of coming into the jurisdiction of the United States owned in whole or in part by a corporation, citizen or subject of the Empire of Germany . . . have been taken over and operated by the United States or in the service of the United States.
>
> NOW THEREFORE, the possession and title of the United States in all such vessels is taken over in accordance with joint resolution adopted by Congress and approved by the President May 12, 1917.

The question presented by these motions for the decision of the Arbiter is, Was title to the four ships, for the value of which awards are sought, "taken by or on behalf of the United States under the authority of the joint resolution of May 12, 1917" within the meaning of the quoted language found in the Settlement of War Claims Act of 1928? If not the claims do not fall within the jurisdiction of the Arbiter.

The argument in opposition to the motions is this:

(1) As the records before the Arbiter disclose that these ships were German-owned when the existence of a state of war was declared between Cuba and Germany, and as the records fail to establish that the title to these ships ever legally vested in the Government of Cuba, the Arbiter must, for the purposes of these motions, assume that when these ships, then in the possession of the United States, entered the territorial waters of the United States they were owned in whole or in part by German nationals and, being so owned, the United States automatically, it may be inadvertently, by virtue of the joint resolution of May 12, 1917, took title to them, which title was perfected by the blanket executive order of November 24, 1919.

(2) As it appears from the records that the claims for the four ships in question were among those called to the attention of the Congress when the measure providing for compensating German ship-owners was pending before it, it will be presumed, for the purposes of these motions at least, that the Congress intended the provisions of the Act should include them if they were German-owned at the time they entered the territorial waters of the United States.

The Arbiter rejects these contentions. It is not necessary that he should inquire into Cuba's title. It is sufficient for the purposes of this arbitration that the United States at the time of coming into possession of these ships recognized and continued to recognize Cuba's title and right to possession of them. The Arbiter finds that on August 22, 1917, the United States accepted these ships from Cuba as a loan for use during the war; that it continued to recognize Cuba's title until it returned them to Cuba during the months of February and March, 1920; that, holding them under Cuba, at no time was the United States in a position to take, and it did not in fact attempt to take, title to these ships as German-owned under the said joint resolution; and that the blanket executive order of November 24, 1919, was not intended to embrace and did not in fact embrace them.

One vice of the argument put forward by the claimants is that it fails to take note of the fact that the United States did not take possession of these ships from the German owners or as German ships, but took possession of them as Cuban ships, and its possession was in effect Cuba's possession. Another vice in the argument is that it treats the joint resolution as self-executing, which it is not. The mere entering of a German-owned vessel into the territorial waters of the United States did not operate to vest title to the vessel in the United States. This is true notwithstanding the United States

was in possession of the vessel, and all the more so when it took it, not as German-owned, but from Cuba and with an agreement to return it to her. Title to a German-owned vessel within the jurisdiction of the United States did not by virtue of the joint resolution automatically vest in the United States. The President of the United States could not "inadvertently" take title for the United States to any vessel. Clear and affirmative action by him to that end was essential. The record is not only barren of evidence of such affirmative action but it is apparent from the record that the President of the United States did not intend to include in the blanket executive order of November 24, 1919, as German-owned, the four vessels which the Cuban Government had loaned to the United States for use during the war, title to which had been consistently recognized by the United States as being in Cuba, and which vessels were in fact returned to Cuba in the early part of 1920 upon her expressing a desire to have them back.

In support of the second part of claimants' argument they have submitted in evidence a letter (the pertinent portion of which is copied in the margin)[2] which the Congress had before it when the Settlement of War Claims Act of 1928 was being considered by it. This letter suggested that the United States should compensate the German owners for ships seized by Cuba but turned over to and used by the United States.

From this the claimants seek to deduce that for the purposes of these motions it will be presumed that the Congress intended that these ships should be embraced in the Act in the absence of clear proof that the Congress intended to exclude them on the ground that the legal title to them had vested in Cuba prior to their coming into the possession of the United States. The argument is inconclusive. But the legislative record removes all doubt of the intention of the Congress with respect to these ships. The letter mentioned, submitted by claimants, is not the only one in that record referring to them. There is found therein a communication from a distinguished counsel, who appears before the Arbiter among the counsel for

[2] Senate Document No. 191, 69th Congress, 2nd Session, page 7:

WASHINGTON, D. C., *February 19, 1926.*

MR. GARRARD B. WINSTON,
Undersecretary of the Treasury,
Washington, D. C.
DEAR MR. WINSTON:

* * * * *

Since columns 2 and 3 of the said list contain the ships seized in Panama and Cuba, I deducted the respective amounts . . . from the total of the first column . . . as quoted in my letter of December 30, 1925.

In the meantime I was informed that the ships seized in Panama as well as in Cuba had been turned over to the United States and used by it, and therefore might fall within the agreement.

* * * * *

Very truly yours,

(Signed) J. W. KIESSELBACH.

claimants, protesting that the bill then being considered did not include Cuban ships used by the United States and that it should be so amended as to include them.[3] It is evident that these and similar suggestions had the careful consideration of the committees having the measure in charge. The Chairman of the Committee on Finance in reporting this measure to the Senate with certain amendments stated:[4]

> It was suggested that we should pay for the use of certain ships during the war title to which was not taken over by the United States. This suggestion relates to four German ships which were taken by the Cuban Government and which were turned over by the Cuban Government to the United States for its use. At the end of the war these ships were returned to Cuba. Your committee could see no justification for paying the German owners.

Summing up, the Arbiter finds that the four ships here involved were seized by the Cuban Government; that they were in the possession of Cuba and not of German nationals when Cuba delivered them in Cuban waters to the United States for use during the war; that the United States could not have attempted to take title under the joint resolution of May 12, 1917, without disavowing its acknowledgment of Cuba's title which it at all times recognized; that the entire course pursued by the United States with respect to these ships conclusively demonstrates that it had no thought of repudiating its agreement with Cuba which it has in fact carried out; that the records negative the contention that the blanket executive order of November 24, 1919, by its terms embraced the Cuban ships; that the United States never claimed, took, or held title to these ships, but they were at all times, so far as the United States was concerned, Cuban vessels borrowed for use during the war, and returned to Cuba before the termination of the war between the United States and Germany; and that the Congress, after considering the claims for the value and/or use of these particular ships, advisedly excluded them from the Act.

The Arbiter holds that these claims are not embraced within the provisions of the Settlement of War Claims Act of 1928, and therefore not within his jurisdiction, and the motions to dismiss are sustained.

Done at Washington December 3, 1928.

EDWIN B. PARKER,
Arbiter.

[3] Letter of Professor Edwin M. Borchard to the Chairman of the Committee on Ways and Means of the House of Representatives, April 5, 1926, at pages 372 and 373 of Hearings on the bill H. R. 10820 (Mills bill).

[4] Congressional Record, 70th Congress, 1st Session, page 3101, February 16, 1928.

CLAIMS COMMISSION—UNITED STATES AND MEXICO[1]

THE ORIENTAL NAVIGATION COMPANY *v.* THE UNITED MEXICAN STATES
(Docket No. 411)

Opinion rendered October 3, 1928

In time of civil war, when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war.

The trading of the American vessel *Gaston* with the port of Frontera, Mexico, was perfectly lawful. The Federal Mexican authorities would not have been justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it. Neither would a Mexican warship have a right to interfere, if, for example, on the high seas it met with a vessel bound for a port in the hands of insurgents. On the other hand, the authorities do not show, and the Commission is of the opinion that it cannot be assumed, that the Federal Mexican authorities should be obliged to permit the unloading and the subsequent reloading of a neutral vessel trading with an insurgent port without such clearance documents as are prescribed by Mexican law.

In the present case it cannot be fairly said that the port of Frontera was in the hands of the insurgents at the time when the events in question took place. It was in fact partly commanded by the Mexican Federal warship *Agua Prieta*. That being the case, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance, can hardly be challenged.

Dissenting opinion by NIELSEN, *Commissioner:* Established principles of international law with regard to blockade were not observed, and a ship engaged in trading in a perfectly lawful manner was the victim of an interference which was an invasion or confiscation of property rights. The pronouncements of governments, the opinions of international tribunals, and the writings of authorities all support the view that effective blockade is necessary to close an insurgent port. The brief visit of the *Agua Prieta* to the waters outside of Frontera was not an effective blockade of ingress and egress. The communication sent to the Government of the United States with respect to the closing of the port of Frontera, which made no mention of blockade, was neither notice nor proclamation of blockade. The firing of some shots in the direction of the *Gaston* lying in the harbor, and the signal sent to it ordering it to depart, were not a proper substitute for capture or prize court proceedings or warning. There is no distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognized, and a port occupied by insurgents to whom that status has not been accorded.

Counsel: United States, John J. McDonald, Assistant Agent; Mexico, Jesús Monroy Terrés.

The Presiding Commissioner, DR. SINDBALLE, *for the Commission:*

On April 15, 1924, the steamship *Gaston*, owned by the Southgate Marine Corporation, and, according to a time charter dated February 28, 1924, operated by the Oriental Navigation Company, an American corporation, cleared the port of New Orleans with a cargo of general merchandise consigned to Frontera, Tabasco, Mexico. When this cargo was unloaded, the vessel was to load a cargo of bananas, consisting of fifteen or sixteen thousand bunches, which had been purchased by agents of the Oriental Navigation Company and was to be transported from Frontera to New Orleans for the purpose of sale at the latter place for the company's account.

At that time the port of Frontera and some other Mexican ports were in the hands of insurgents. The Government of the United Mexican States

[1] Under the convention concluded September 8, 1923, as extended by the convention signed August 16, 1927. Kristian Sindballe, *Presiding Commissioner;* Fred K. Nielsen, *Commissioner;* G. Fernández MacGregor, *Commissioner.*

had decreed that those ports should be closed to international trade, and had officially informed the Government of the United States of America about the closure. In reply the Government of the United States of America had declared that it felt obliged to respect the requirements of international law according to which a port in the hands of insurgents can be closed by an effective blockade only, and, further, that it felt obliged to advise American citizens engaged in commerce with Mexcio that they might deal with persons in authority in such ports with respect to all matters affecting commerce therewith.

The *Gaston* arrived at Frontera on April 20, and anchored in the roadstead. The following day the unloading of her cargo was begun. In the afternoon the Mexican gunboat *Agua Prieta* was noticed cruising in the offing and ordering the *Gaston* to put to sea. On April 22 this order, accompanied by some random shots, was repeated, and subsequently the *Gaston*, having communicated with the *U. S. S. Cleveland* and the *U. S. S. Tulsa*, put to sea, having unloaded only part of her cargo, and without having loaded any part of the cargo of bananas. The vessel went back to New Orleans, where the rest of her cargo was unloaded. The cargo of bananas became a total loss.

On behalf of the Oriental Navigation Company the United States of America are now claiming that the United Mexican States should indemnify the company for the loss suffered by it from the action of the gunboat *Agua Prieta*. The loss is alleged to amount to $15,400.91, which sum is claimed with the allowance of interest thereon.

The respondent government refers to the fact that the belligerency of the insurgents in question had been recognized by no foreign power. It follows therefrom, the respondent government contends, that the Federal Government of Mexico, notwithstanding the revolution, was vested with full and undivided sovereignty over all her territory, so that it was a question solely dependent upon domestic Mexican law whether or not the Federal Government was entitled to close a Mexican port. But according to the General Customs Regulations of Mexico, whenever a port is occupied by rebels, it will be deemed closed to legal traffic, no Federal consul or other official will authorize shipment of merchandise to it, and persons violating this law will be liable to the punishment prescribed for smugglers.

In the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the government of the United Mexican States was entitled to close the port of Frontera. In time of peace, it no doubt would be a question of domestic law only. But in time of civil war, when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war. It is clear also, that if this principle be not adopted, the conditions of neutral commerce will be worse in case of civil war than in case of war.

Now, it has been submitted by the respondent government that the law protecting neutral commerce is not the same after the World War 1914–19 as it was before. The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the members of the League, under certain circumstances, to carry on economic war against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation. The Commission is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the World War. It is true that, according to that law, the trading of the *Gaston* to the port of Frontera was perfectly lawful. The Federal Mexican authorities would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it. Neither would a Mexican warship have a right to interfere, if, for example on the high seas, it met with a neutral vessel bound for a port in the hands of insurgents. But, on the other hand, the authorities do not show, and the Commission is of the opinion that it cannot be assumed that the Federal Mexican authorities should be obliged to permit the unloading and the subsequent loading of a neutral vessel trading to an insurgent port without such clearance documents as are prescribed by Mexican law, even in case control of the port should have been obtained again by those authorities before the arrival of the vessel to the port or be reobtained during her stay there. Now, in the present case, it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place. It was in fact partly commanded by the *Agua Prieta*. That being the case, and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican consul at New Orleans for clearance, can hardly be challenged.

Decision

The claim of the United States of America on behalf of the Oriental Navigation Company is disallowed.

Done in Mexico, D. F., this 3rd day of October, 1928.

KRISTIAN SINDBALLE,
Presiding Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

COMMISSIONER NIELSEN, *dissenting.*

This case raises an issue whether under international law authorities of a government may properly by some domestic enactment in the form of an executive decree or legislation close a port in the possession of revolutionists, without preventing ingress or egress by means of an effective blockade, as that term is understood in international law and practice. The issue in the instant case may be more specifically stated to be whether, in the absence of a legal blockade, the interference by the Mexican war vessel, *Agua Prieta*, with the steamship *Gaston*, resulting in loss to those operating the latter, entails responsibility under international law on the respondent government.

In behalf of the United States it is contended that responsibility exists, and contentions to this effect are grounded on assertions found in opinions of international tribunals and in diplomatic exchanges and in connection with precedents in other forms. As illustrative of the general tenor of these the following passage may be quoted from a statement made in the House of Commons on June 27, 1861, by Lord John Russell, Secretary of State for Foreign Affairs of Great Britain, in regard to an announcement made in that year by the Government of New Granada concerning the closure of certain ports in possession of persons engaged in a civil war:

> The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades. (Moore, *Digest of International Law*, Vol. VII, p. 809. For other precedents see *op. cit.*, pp. 803–820; Borchard, *Diplomatic Protection*, p. 181; Ralston, *The Law and Procedure of International Tribunals*, pp. 406–408.)

The burden of the argument made in behalf of the Government of Mexico is a forceful presentation in the brief and in oral argument of the view that the closure of a port under the conditions revealed by the record in the present case, without the institution of a blockade, could properly take place through the legal exercise of sovereign rights recognized by international

law, since a distinction must be made between the closure of a port occupied by insurgents possessing a status of belligerency and the closure of a port occupied by revolutionists who have not the status of belligerents. It was pointed out that neither the Mexican Government nor any other government had recognized the belligerency of the de la Huerta forces. Some contention seems also to have been made in the Mexican brief and in the course of oral argument to the effect that the measures taken to close the port of Frontera satisfied the requirements of international law with respect to the exercise of the right of blockade.

Without discussion at this point of the soundness of that contention, it may be pointed out that the argument seems inconsistent with the principal contention upon which the defense is grounded. To be sure it is permissible to plead consistent defenses. However, in the Mexican brief, as well as in the oral argument, it was clearly contended that there was no blockade at Frontera, and that the legal situation of that port was such that the law of blockade could not apply to it. The measures employed to interrupt intercourse with the port of Frontera could not be both a blockade and not a blockade. And it therefore seems to me that unwarranted emphasis is placed in the opinion of my associates on what I may call the secondary ground of defense presented by the Mexican Government, namely, that the action of the Mexican authorities might be regarded as proper in the light of rules of international law with respect to blockade. I shall discuss first and mainly the principal contention upon which, it seems to be clear, the Mexican Government rests its case, namely, that a distinction must be made between the closure of a port in the control of insurgents to whom a status of belligerency has been accorded and the closure of a port occupied by revolutionists not having that status.

On the point whether this distinction exists in the law, information with regard to the precedents cited in the American brief and in the Mexican reply-brief is incomplete. That information does not reveal the nature of the revolutionary movements to which the precedents cited relate, except as regards the American Civil War, the legal status of which is of course well known. In the early stages of that struggle a state of belligerency was recognized by several governments, and at least impliedly by the parent government. Nor was any such information furnished by the United States in a counter-brief after the development of the issue in the Mexican counter-brief.

To my mind no definite conclusion can be drawn from the citations in the brief of each government as to the existence or nonexistence of a rule of international law *specifically applicable to the case of a closure of a port occupied by insurgents who do not possess the status of belligerents.* It would seem that some governments have not acquiesced in the principle underlying declarations similar to those made by Lord John Russell. It is therefore important to consider whether it is possible to invoke rules or principles of law which are

applicable to the issue raised in the instant case and which can be shown by the evidence of international law to have received the general assent which is the foundation of that law.

I am of the opinion that there are two aspects of this case in the light of which responsibility on the part of the respondent government should be fixed, even though it may logically be said that responsibility may be determined solely in the light of the principles stated by Lord John Russell. Established principles of international law with regard to blockade were not observed, and a ship engaged in trading in a manner which it is stated in the opinion of my associates "was perfectly lawful" was the victim of an interference which to my mind was an invasion, or it might be said, a confiscation, of property rights.

In my opinion this case does not reveal any arbitrary act on the part of the Mexican Government in the sense that Mexican authorities deliberately ignored international law in declaring the port of Frontera closed. On the other hand, I do not consider that the charterers of the *Gaston* had any intention of flouting a proper Mexican law. They unquestionably suffered loss as a result of the action of Mexican naval authorities, and if that action, which it is explained was taken pursuant to Mexican legislation, did not square with international law, the claimants should receive compensation. If the action was justifiable under international law, the claimants of course must bear the loss they sustained.

I am of the opinion that judicial and administrative officials who have frequently asserted the broad principle embraced by the statement of Lord John Russell, that it is not competent for a government to close ports in the hands of insurgents except by effective blockade measures, have made no distinction between the closure of ports occupied by revolutionists to whom the status of belligerents has been accorded by some affirmative act, and ports occupied by forces not so recognized as having that status. In my judgment they have logically refrained from making such a distinction, because such a recognition of belligerency is not a sound and practical standard by which to determine the propriety or impropriety of the closing of a port. The consideration of this specific point seems to require an examination into the nature of belligerency and the evidence by which a judicial tribunal might be guided in reaching a conclusion with respect to the existence or non-existence of that status. Evidence of this nature would not in all cases be such as could warrant sound conclusions of law.

The recognition of a new state, that is, the acceptance by members of the family of nations of a new member, an international person, is regarded by governments as a political question, although the act of recognition should of course be grounded on a sound legal basis. The same is true—it may perhaps be said more particularly true—with regard to what is sometimes spoken of as a recognition of a change in the headship of a state, or in the form of government of a state; an act that may perhaps be more properly described

as a determination on the part of an established government to have diplomatic relations with a new set of authorities who come into control of a state following an insurrection. This of course is not a case of the recognition of an international person. So it seems to me that the recognition of a state of belligerency, so-called, on the part of governments involves very largely political considerations.

Judge John Bassett Moore has said that the "only kind of war that justifies the recognition of insurgents as belligerents is what is called 'public war'; and before civil war can be said to possess that character the insurgents must present the aspect of a political community or *de facto* power, having a certain coherence, and a certain independence of position, in respect of territorial limits, of population, of interest, and of destiny." And he has added as an additional element essential to a proper recognition of a state of war "the existence of an emergency, actual or imminent, such as makes it incumbent upon neutral powers to define their relations to the conflict." In other words, interests of neutral Powers must be affected before they are justified in acting. *Forum*, Vol. 21, p. 291.

Dr. Oppenheim says that "in every case of civil war a foreign State can recognize the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a government of their own, and conduct their military operations according to the laws of war." *International Law*, 3rd ed., Vol. I, p. 137. Such a situation existed following the outbreak of the American Civil War in 1861, which has been referred to in the briefs of both governments. After President Lincoln had issued a proclamation of blockade by the Federal Government, other governments were doubtless justified, from a legal standpoint, in taking affirmative action to give recognition to the existence of a state of belligerency between the Northern States and the Southern States, and some governments did this by issuing declarations of neutrality. See Moore, *International Law Digest*, Vol. I, p. 185. But in a case in which no such action is taken by a parent government the situation may be much less simple. Governments are guided by different considerations of policy or expediency as to the conditions and times of recognition either of new states or of a status of belligerency. And it seems to be doubtful that it can be accurately said that such a status in law is necessarily dependent upon some such affirmative acts. A parent government may not choose to take such action and other governments may likewise refrain from doing so. Yet the situation described by Dr. Oppenheim may nevertheless exist. The same writer, while asserting, in disagreement with some other writers, that a state becomes an international person through recognition only, observes that international law does not say that a state is not in existence as long as it is not recognized. A new régime or government may gain control of a country and be the *de facto*, and from the standpoint of international law therefore the *de jure* government, even though other governments may not choose to "recognize" it, as is often said,

or as might probably better be said, to enter into diplomatic relations with it. And it seems to me that the same political situation may exist with respect to a state of belligerency, when the term is used to connote simply the fact of the existence of war. Of course I do not mean to suggest that the recognition of belligerency by a parent government or by other governments does not entail important consequences. The rights and obligations of revolutionists that are derived from the state of belligerency under international law are well defined. See on this point and on the subject of the conditions warranting recognition of belligerency, Moore, *International Law Digest*, Vol. I, pp. 164–205.

It is interesting to consider in connection with this question the citation made by counsel for the United States of the opinion of this Commission in the case of the *Home Insurance Company*,[1] Docket No. 73, *Opinions of the Commissioners, 1927, U. S. Government Printing Office, Washington*, p. 51. He quoted from the conclusions of the Commission with regard to the nature of the revolutionary movement in Mexico in 1923 and 1924, as follows:

> The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict or personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation.

I accept the conclusions of the Commission in regard to the facts stated in this opinion in which I did not participate. Counsel argued that, Mexico not having been held responsible for the acts of insurrectionists in this case, because control over those acts was beyond the power of the Mexican authorities, the Mexican Government should be held responsible in the instant case under international law for improper interference with a ship trading with a port in control of the same forces for whose acts Mexico was held not to be liable in the *Home Insurance Company* case.

If the observations which I have made with regard to considerations that may prompt recognition or non-recognition of belligerency by governments are correct, it would not seem to be logical to attempt to make any distinction between the closure of a port held by insurrectionists who by some affirmative acts have been recognized as belligerents, and a port in the hands of revolutionists to whom such a status had not in this manner been accorded. And since it would appear to be impracticable in all cases to make that dis-

[1] This JOURNAL, Vol. 21 (1927), p. 167.

tinction, there would seem to be a good reason why it has not been made, as it apparently has not. It is not my purpose to attempt to state any principles as to what constitutes a state of belligerency or justification for recognition of belligerency, nor principles as to the effect of affirmative acts of recognition or of the absence of such acts, but merely to indicate that in my opinion the distinction contended for by the Mexican Government has not been made by governments or by international tribunals that have dealt with this question of the closure of ports without the enforcement of the closure by blockade measures, and that the distinction is not a logical one.

If this view be correct, it disposes of the Mexican Government's defense, unless account be taken of what I have spoken of as a secondary defense in support of which it was contended that the port of Frontera was blockaded, although it was also contended that the port was not blockaded, and that the legal situation of the port was such that there could be no blockade. If the distinction made by the Government of Mexico has no basis in law, then there is not before the Commission any special situation, but a case governed by applicable, reasonably well established principles of international law with respect to the exercise of the right of blockade. We have not a case governed solely by domestic law, or a case involving a consideration of rules or principles of law which are distinct from those relating to blockade by virtue of some theory that the latter are applicable only in times of international war, or in the case of a civil war when a state of belligerency on the part of insurgents has been recognized by the parent government or by some other government. Mexico has adhered to the Declaration of Paris of 1856 which asserts the rule that a blockade to be binding must be effective. It seems to me scarcely to be necessary to say anything to show that no blockade was established and maintained at Frontera in accordance with international law.

I do not consider it to be necessary, although I deem it to be proper, to ground my views with regard to the responsibility of Mexico in the instant case solely on principles of law with respect to the exercise of belligerent rights in relation to blockade. In the Mexican brief and in oral argument it was contended that Article VI of the Mexican customs laws is not repugnant to international law. This Commission on several occasions has had under consideration acts of authorities of a government violative of personal rights, also the standing in international law of domestic laws destructive of property rights. It seems to me that this article of the customs laws, if given the interpretation put upon it by counsel for Mexico in the Mexican brief and in oral argument, according to which interference with the claimant's vessel is justified, must be regarded as legislation of that kind. The article reads as follows:

> When the place in which a maritime or border custom house is located secedes from the obedience of the Federal Government, or is occupied by forces in revolt, legal traffic therewith shall be held immediately as

> closed and, from that time, no Federal office shall authorize the despatch of merchandise for the point which has withdrawn from Federal authority, nor shall it receive merchandise coming from such place until it shall return to obedience of the Federal power. Goods en route to the closed custom house may be imported through another custom house as provided by this law. The violators of this provision shall be punished as stipulated by this ordinance for smugglers, without prejudice to applying other penalties corresponding to the case. (Translation.)

In sweeping terms the law purports to close all insurgent ports without reference to any specific port. Let it be assumed for the purpose of discussion—at variance with the contention made in behalf of the United States—that a government may properly under international law by some form of legal enactment close a given port without effectively by proper blockade impeding ingress and egress. Such action would assuredly be entirely different from action taken pursuant to a law which closes ports without specifically mentioning the ports closed. The operators of a vessel accustomed to enter a given port might discover as it entered that the place had been occupied by revolutionists on the very day of entry and might find themselves in the position of law-breakers. Doubtless it may be properly stated as a general principle that penal legislation involving punishment by confiscation of property must be framed so as to give some notice of proscribed acts. This principle is obviously entirely distinct from the general principle that ignorance of law is no excuse for violation of the law. A different kind of a law would be one providing for the closing of ports in the hands of insurrectionists following some public pronouncement in a given case with respect to a designated port coming under the control of revolutionists. Such a pronouncement could have the effect of law. The notice sent to the Government of the United States by the Mexican Ambassador under date of December 18, 1923, with regard to the closing of the port of Frontera was not in my opinion any such law. A similar notice might be very important in the case of a proclamation of blockade, that is, of course, if it had the effect of announcing a blockade. But the notice given can not be considered as a law of which the owner of a vessel should take cognizance. And one government can not expect that its domestic legislation or decrees or orders shall be carried out by another government through some form of restraint imposed on the vessels belonging to the latter.

I have indicated the view that the interference with the operations of the steamship *Gaston*, which it is said took place pursuant to Article VI of the Mexican customs laws, was destructive of property rights. In the opinion of my associates it is said that "the trading of the *Gaston* to the port of Frontera was perfectly lawful." I agree with that view. If the *Gaston* was engaged in lawful operations when it was prevented from taking on its cargo, which became a total loss as a result of the action taken by the *Agua Prieta*, I am unable to perceive that this action can be regarded as a proper one, entailing no responsibility on the part of the Mexican Government. It does

not seem to me that the majority opinion of the Commission justifies the interference by the war vessel with the pursuit of a lawful avocation by the merchant vessel.

It is interesting to consider by the way of analogy in connection with this point an opinion rendered by Mr. Justice Hughes of the Supreme Court of the United States in the case of *Truax* v. *Raich*, 239 U. S. 33.[2] In that case the contention was made that a law of the State of Arizona, restricting the employment of aliens by employers in that State, was violative of the Fourteenth Amendment to the Federal Constitution, in that it involved a denial of the equal protection of the laws. The contention was sustained. The "right to earn a livelihood," said Mr. Justice Hughes, "and to continue in employment unmolested by efforts to enforce void enactments" is one which a court of equity should protect. And he declared that it required no argument to show that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

With respect to the argument made in behalf of the Government of Mexico that Article VI of the customs laws is not in derogation of international law, it seems to be pertinent to take account of another aspect of that enactment, in the light, of course, of the construction put upon it by counsel. Under that construction the closure of any place which has seceded or which may be occupied by forces in revolt is authorized. No distinction is made in the terms of the law between a port in the hands of revolutionists whose belligerent status has been recognized by some affirmative act, and a port controlled by forces not so recognized. In the Mexican brief the argument seems to be made that, only in the case of international war must the closure of ports be effected by measures of blockade, yet, in oral argument counsel for Mexico evidently took the correct position that, in the case of civil war when a status of belligerency is accorded to insurrectionists, international law requires that the closure of ports in the hands of insurrectionists must be enforced by blockade.

In giving application to law, a judicial tribunal is not concerned with questions with respect to the propriety or the advantages or disadvantages of a rule of law that neutrals have a right to carry on trade with insurgent ports, unless they are prevented from doing so by methods prescribed by international law. The principle underlying the rule may perhaps be said to have something in common with that which has frequently been asserted, to the effect that the right of aliens to deal with insurgents in control of a given territory must be recognized, and that if the aliens are required to pay duties or taxes to insurgents, a government which regains control of the territory should not exact double payments. See Moore, *International Law Digest*, Vol. VI, pp. 995–996.

By an Act of Congress of the United States of July 13, 1861, the President

[2] This JOURNAL, Vol. 10 (1916), p. 158.

was authorized to proclaim the closure of ports of the southern Confederacy. However, this enactment seems to have been construed by the Government of the United States as a measure conferring on the Executive authority, if that should be deemed to be necessary, to close these ports. And they were closed by a formal proclamation and the maintenance of a blockade. Moore, *International Law Digest*, Vol. VII, pp. 806–812; Oppenheim, *International Law*, 3rd ed., Vol. 2, p. 515.

I am not certain that I understand the precise ground on which Mexico is absolved from responsibility in the opinion of the majority of the Commissioners. It is said that in "the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera." And the view is indicated that "in time of civil war, when the control of a port has passed into the hands of insurgents," application must be given to international law. It would appear therefore that the majority opinion rejects the Mexican Government's contention that the closing of the port of Frontera, conformably to Article VI of the customs laws, was consistent with international law. The view seems further to be made clear by the statement, to which inference has already been made, that "the trading of the *Gaston* to the port of Frontera was perfectly lawful", although it was contended in behalf of Mexico that the action of the vessel was a violation of Article VI of the customs laws. If this statement is correct—and I am of the opinion that it is, in the light of international law—it would appear that in the opinion of all three Commissioners Article VI of the customs laws, as construed by counsel for Mexico, is at variance with international law. The further conclusion must therefore follow that in accordance with international law the closure of the port could properly be effected only by a blockade.

The majority opinion proceeds to a discussion of some predictions made in the Mexican brief with regard to the future of international law relative to the exercise of belligerent rights. It is said in the brief that the "modern blockade can no longer be attempted to be subjected to the condition of effectiveness"; that "a blockade will not be established merely by vessels stationed or by cruisers operating in the vicinity of the enemy's coast"; that it will be established "by stationing war vessels in all seas, at every point in the globe, on commercial routes, which will stop all vessels whose destination to the territory declared to be blockaded may be proven or presumed, or by constituting zones of war more or less extensive in the jurisdiction of that territory, in which zones mines will be placed or submarines will cruise." The argument appears further to be made in the brief that the action taken with respect to the closing of the port of Frontera, including the action of the *Agua Prieta*, may be justified in the light of "the new international theories which arose by reason of the War of 1914–1919."

I am unable, as I have already indicated, to reconcile contentions of this

kind with statements in the brief (probably not altogether adhered to in oral argument) to the effect that no question of blockade could arise in connection with the closing of the port pursuant to sovereign rights exercised in accordance with Article VI of the customs laws. As illustrative of statements of this character, attention may be called to the following:

> The first thing to observe in this connection is that the belligerency of the revolutionary movement in question was never recognized by any foreign country and much less by the United States of America. We are, then, before a case where there are no belligerents, where there are no neutral powers and where, therefore, the simple basic elements of the right of blockade are lacking. This shows that the revolution with which we are dealing, cannot be governed by those rules of international law which apply to blockades. But said revolution must be governed by some laws and if the latter are not those of international sanction relative to blockades, they necessarily have to be the laws of Mexico, inasmuch as the unity of this nation and the sovereignty of her only recognized government were not interrupted for a single moment. (p.28.)
>
> * * * * *
>
> Summarizing: in case of civil war, while the belligerency of the faction opposed to the Government has not been recognized, the municipal laws of the country continue to be applicable and international law is not applicable. (p. 29.)

The views expressed in the Mexican brief with respect to the change and the future of international law appear to find some support in the following passage found in the opinion of my associates:

> The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the members of the League, under certain circumstances, to carry on economic war against any enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rules of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.
>
> If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation.

Of course custom, practice, and changed conditions have their effect on international law as well as on domestic law. However, it need not be

observed that a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control of the sea in a given locality to act in conformity with established rules of law does not *ipso facto* result in a change of the law or justify disregard of the law. And if we indulge in speculation, it would not be a rash conjecture, in the light of experience, that the same belligerent, should his position be changed by a loss of control of the sea, would insist strongly on the observance of established rules and principles. It seems to be probable that among those who have given serious thought to the breakdown of the system of international law with regard to the exercise of belligerent rights on the seas and to the possibility of formulating rules that will be respected, there may be some who would not complacently vision a system of promiscuous seziure of and interference with neutral merchant vessels, or the promulgation of edicts with regard to forbidden mine-planted zones in the high seas in which the nations have a common right. Indeed it may be suggested that some might find it a more proper solution of the problem that the high seas should be maintained as the common highways in time of war, as in times of peace, and that to that end, interference with neutrals might be restricted to belligerent waters only.

A rule of law is put to a test whether it means something when honorable respect for it involves inconvenience or material sacrifice, or whether it is to become farcical by being flouted under some theory of plasticity or changed conditions, theories similar to the somewhat dangerous doctrine of *rebus sic stantibus* with respect to treaties. It is an elementary principle that the propriety of an act is governed by the law in force at the time the act is committed. International law is a law for the conduct of nations grounded on the general assent of the nations. It can be modified only by the same processes by which it is formulated. A belligerent can not make law to suit his convenience. An international tribunal can not undertake to formulate rules with respect to the exercise of belligerent rights, or to decide a case in the light of speculations with regard to future developments of the law, thought to be foreshadowed by derogations of international law which unhappily occur in times of war. Members of the League of Nations doubtless have entered into certain obligations under Article 16 of the Covenant of the League, but it must not necessarily be presumed that they must carry out their contractural obligations in violation of international law. It should rather be assumed that any action taken in fulfillment of such obligations will be executed in a manner consistent with that law. In the agony of great international conflict, resort may be had to expedients to circumvent law, but the law remains. As was said by Acting Chief Justice Sir Henry Berkeley in the case of the *Prometheus:*

> A law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by

> any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it. (Supreme Court of Hongkong, 2 Hongkong Law Reports, 207, 225.)

The majority opinion, after discussing views with regard to the possible law of the future, states that it is unnecessary to pass an opinion with regard to those views, and that the Commission "is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the World War." The reasoning of the opinion up to this point evidently is that the port of Frontera could not be closed by some order or decree pursuant to a domestic law, and that international law was applicable in considering the measures that might properly be employed. Those measures it is concluded were in harmony with international law existing prior to the World War with regard to the exercise of the right of blockade. I disagree with that view. A belligerent is accorded the right to obstruct trade with a port both, as regards ingress and egress, by virtue of the physical power to effect the obstruction and of the exercise of that power. I think that it is unnecessary to enter into any detailed discussion of the meaning of an effective blockade in order to show that none existed at Frontera—even if considerable allowance be made for speculation concerning recent changes in established principles of law.

It appears from the record that the steamship *Stal*, with respect to which a claim was argued in connection with the instant case, had been in port for ten days when the *Agua Prieta* arrived in the locality of Frontera, and that the *Gaston* arrived one day previous to that time. From evidence presented by Mexico it appears that Mexican authorities had undertaken to close several ports on the Pacific, the Gulf and the Atlantic coasts, including the port of Frontera. The coast line along which the Gulf ports and the Caribbean ports were closed, is approximately 900 miles in length. From evidence filed by the Mexican Government it appears that one gunboat, the *Agua Prieta*, and two revenue cutters were engaged in carrying out what is called a blockade in a communication sent by a Mexican naval commander to his government under date of April 25, 1924. It appears from the record that one of the purposes of the *Agua Prieta* was to conduct an inspection of lighthouses. From a report made by the commander of the *Agua Prieta* it appears that, due to trouble with the engine, his vessel was able to travel only at approximately two miles an hour. The brief visit of the *Agua Prieta* to the waters outside of Frontera was not an effective blockading of ingress

and egress. The communication sent to the Government of the United States with respect to the closing of the port of Frontera which made no mention of blockade was neither notice nor proclamation of blockade. In the written and in the oral argument in behalf of Mexico it was suggested, presumably on the theory that notice was required, that that communication might be considered as notice of blockade. The firing of some shots in the direction of the *Gaston* lying in the harbor and the signals sent to it ordering it to depart were not a proper substitute for capture or prize court proceedings or warning.

By way of comparison, mention was made in the record of the blockade measures employed during the American Civil War. The coast of the Confederate States to the extent of 2,500 nautical miles was blockaded by about 400 Federal cruisers. Oppenheim, *International Law*, Vol. II, 3rd ed., p. 525. At the single port of Charleston there were stationed in July of the year 1863 twenty-three vessels. *Proceedings of the United States Naval Institute*, Marine International Law, Commander Henry Glass, U. S. N., Vol. XI, p. 442. Possibly a single vessel might have satisfied the requirement of the situation at Frontera, but the visit of the *Agua Prieta* in my opinion did not.

Towards the close of the majority opinion are some observations which would seem to be at variance with the view expressed in a preceding portion to the effect that, in spite of the provisions of Article VI of the Mexican customs laws, and the closure of that port pursuant to that article, the trading of the *Gaston* with the port of Frontera was perfectly lawful; that domestic law alone was not determinative of the right of the Mexican Government to close the port; and that Federal authorities "would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it." These views it seems to me must be grounded on the theory that the port was out of the control of the Mexican authorities; that therefore international law and not domestic law governed the right of a ship to enter and to leave the port; and that according to international law capture, confiscation or the infliction of any other penalty on the *Gaston* would have been improper. However, it is said in the majority opinion that "it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the event in question took place"; that that port was "in fact partly commanded by the *Agua Prieta*"; and that this being the case, "and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican consul at New Orleans for clearance, can hardly be challenged." As I have just observed, this view seems to me to be at variance with the reasoning of other portions of the opinion, and it appears to be equally at variance with the contentions of the Mexican Government, and with the facts disclosed by the record.

In the notice of December 18, 1923, sent by the Ambassador of Mexico to the Department of State at Washington it is stated that the port of Frontera had been removed "from the action of the constituted legitimate authorities." In the Mexican answer in the case relating to the *Stal*, it was stated that the order of closure was a proper one to prevent that any local or international trade be carried on with the port which because of sedition "has been temporarily wrested from the control of the legitimate authorities as has been in fact the situation with the port of Frontera at the time when the said vessel (the *Stal*) arrived." In a notice sent by the Mexican Legation in Havana to the Secretary of State of Cuba, under date of May 31, 1924, it was stated that the port of Frontera had again "come under the control of the constitutional authorities." In a communication among the records of the de la Huerta insurrection found in the archives of the Department of Foreign Relations of Mexico, it is stated that the ports of the Gulf of Mexico and the Caribbean Sea with the exception of Tampico "are out of the control of the Government." In a message sent by Rear Admiral H. Rodríguez Malpica to the Secretary of Foreign Relations of Mexico, it is stated that the former "effected blockade" in the port of Frontera and other ports "held by rebels."

It is possible to conceive of an interesting situation in which land forces of insurgents might be in control of a seaport town and yet not in complete control of the port, because entry might be commanded by regular forces on an island or promontory from which the mouth of the harbor could be commanded. But in my opinion the casual visit of the *Agua Prieta* for a day in the vicinity of the port of Frontera in the manner disclosed by the record does not justify the conclusion that the port was in fact partly commanded by the *Agua Prieta*. The visit occurred, as has been pointed out, ten days after the *Stal* entered the port and one day subsequent to the entry of the *Gaston*. I do not believe that a single, brief visit of a war vessel in the vicinity of a port occupied by insurgents is tantamount to a control or command of the port that would relieve a government of the obligation to maintain a blockade as required by international law for the purpose of effecting a closure of the port.

As I have indicated, I am of the opinion that international law with regard to the exercise of the right of blockade is applicable to the situation existing at the port of Frontera when the *Gaston* was subjected to interference and consequent loss. I do not think there is any distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognized by some affirmative act and a port occupied by insurgents to whom that status has not been accorded in that manner. I therefore disagree with the contention upon which the Mexican Government's defense is based with respect to this distinction. And I accordingly must therefore also disagree with a somewhat similar distinction which seems to be made in the American brief in which it is said that "the laws of war, and

therefore the laws of blockade, had and could have no application to the situation under discussion, for it does not appear that either the Government of Mexico or the Government of the United States had recognized a status of actual belligerency as existing in Mexico at this time." In the course of oral argument counsel for the United States seemed to depart from that view.

The American brief seems to treat the closing of a port held by insurgents whose belligerency had not been recognized by some government as a kind of special case to which the law of blockade is not applicable. If this view be correct, and if international law with regard to blockade is not applicable in such a case, then a parent government would seem to be impotent, if it can not close a port by domestic enactment, to close the port at all, in the absence of some action by the parent government distinct from a blockade or following some form of recognition by other governments each of which might in behalf of its own vessels solely, or in behalf of the vessels of another country, legalize a blockade. I do not agree with such a view.

President Lincoln did not defer issuing a proclamation of blockade of the ports of the Confederate States until he had by some other affirmative act "recognized a state of actual belligerency" of the seceding states. The establishment of the blockade has generally been considered to be the recognition of a state of war and has been so regarded by American courts. Prize Cases, 2 Black 635. Nor did President Lincoln before establishing a blockade await some affirmative acts of recognition of belligerency by other governments. Their acts followed the establishment of the American blockade and generally took the form of declarations of "neutrality." Moore, *International Law Digest*, Vol. 1, pp. 184–185.

Insurgent ports can be closed by effective blockade measures. The pronouncements of governments, the opinions of international tribunals and the writings of authorities, in my opinion, all support the views that effective blockade is necessary to close an insurgent port, and that no distinction such as that for which the Mexican Government contends exists. This view is not at variance with the contention advanced in behalf of Mexico that Mexican sovereignty continued to exist in the territory occupied by insurgents. The Mexican Government was not able to exercise governmental functions in that territory, but I take it that *from the standpoint of international law and relations* the sovereignty of a nation over territory occupied by insurgents is not destroyed until insurrectionists have established their independence.

Some precedents cited by counsel might seem to be at variance with the principles asserted by Lord John Russell to which reference has been made, but on examination I think it will be found that they are not.

With regard to the dispute between Spain on the one hand and Germany and Great Britain on the other hand concerning the closing of ports in the Sulu Archipelago, it should be observed that an examination of the diplomatic correspondence with respect to this controversy shows that both Germany and Great Britain took the position that Spain did not possess

sovereignty in the Sulu Archipelago and of course therefore not control. *British and Foreign State Papers*, Vol. 73, pp. 932–996.

In the case of the brig *Toucan*, it appears that Brazilian authorities detained this vessel at San Joze do Norte, where it stopped to discharge a portion of its cargo, and that they refused to let it proceed to Porto Alegre. (Moore, *International Arbitrations*, Vol. V, p. 4615.)

Commissioner Fisher, appointed under an Act of Congress of the United States to distribute the indemnity under the convention of January 27, 1849, between the United States and Brazil, said that the "preventing of the *Toucan* and other vessels by the Brazilian authorities from going up to an interior port which had been closed on account of a civil insurrection existing there at the time, was but the exercise of a right incident to a sovereign state." If the decision of Commissioner Fisher rejecting a claim made in behalf of the *Toucan* should be considered to be in conflict with opinions of international tribunals to the effect that ports in the hands of insurgents can properly be closed only by a blockade, there would seem to be no reason to attribute to that particular opinion greater weight than to the others. On the other hand, Commissioner Fisher's opinion should probably not be construed to be at variance with the views expressed by the Government of the United States and the Government of Great Britain and by international tribunals and writers on international law, that international law does not sanction the closing of such ports merely by a decree or a domestic legislative enactment. Commissioner Fisher seems to have grounded his opinion mainly if not entirely on treaty provisions between the United States and Brazil. Furthermore, it would seem that much can be said in favor of the view that a government might, in the proper exercise of sovereignty, refuse to clear a ship from within its jurisdiction, at one of its own ports, for an inland port within its dominions, temporarily occupied by insurgents.

In a somewhat similar situation it may be doubted that it would be in derogation of international law for authorities of a government to refuse to clear foreign vessels from one of its seaports to another seaport within its territory. However, a different view seems to have been expressed by Commissioners under the convention of September 26, 1893, between Great Britain and Chile in the case of the bark *Chépica*. In 1891 authorities of the port of Valparaiso refused to permit this vessel to sail for Tocopilla, because the latter port was occupied by revolutionary forces. In an opinion rendered on December 12, 1895, this action seems to have been condemned by the British Commissioner and the Belgian Commissioner as violative of international law, although the claim made in behalf of the vessel was dismissed on a jurisdictional point. Moore, *International Arbitrations*, Vol. V, p. 4933. For a discussion of the refusal of Chilean authorities to grant clearance under such conditions, see Moore, *International Law Digest*, Vol. VII, pp. 815–817.

In oral argument counsel for Mexico cited an author, Dr. N. Politis, who appears to sustain the distinction which counsel for Mexico undertook to

make. After referring to blockade in an international war and blockade in a civil war, Dr. Politis says:

> So long as the insurrection has not assumed through the recognition of the insurgents in the capacity of belligerents an international character, and remains a purely domestic conflict, the legally constituted government may close all or part of the ports of the country in the exercise of authority, by police measure, without establishing, properly speaking, a blockade.[1] (*Recueil des Cours*, 1925, Vol. I, pp. 94–95.)

However, the author cites no legal authority for this view and gives no reasons for the distinction he makes. In my opinion a correct statement of the law is found in the following passages from an article by Professor George Grafton Wilson found in Volume 1 of the *American Journal of International Law*, 1907, pp. 55, 58:

> The legitimate government cannot in any way throw the burden of executing its decrees upon a foreign state. Even its decrees of closure in time of insurrection must be supported by sufficient force to render them effective. . . .
>
> Attempts have also been made by the parent state to obtain advantages of a blockade without the obligations of war through a proclamation declaring ports held by insurgents closed. Foreign states have, however, usually taken the position that such decrees are of no effect and the ports in the hands of the insurgents are closed only to the extent to which an effective force may physically prevent entrance. . . .
>
> If ports in the possession of the insurgents could be closed by decree, there would be a close analogy to the old idea of a paper blockade. The principle has come to be generally recognized that in time of insurrection closure to be respected must be by effective force.

The above quoted statements appear to be of particular interest in connection with the question under consideration, since the author's article is largely concerned with the distinction between war in connection with which there has been a "recognition of belligerency by a state" and war which exists without such recognition. The latter the author for the purposes of his discussion apparently designates as "insurrection."

Of similar particular interest are some references in the message of December 8, 1885, sent by President Cleveland to the Congress of the United States. He referred to "a question of much importance" presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. The President explained that the United States could assent to "neither of these propositions"; that "effective closure of ports not in the possession of the government, but held by hostile partisans, could not be recognized"; and

[1] Tant que l'insurrection n'a pas pris par la reconnaissance des insurgés en qualité de belligérants, un caractére international et reste une lutte purement interne, le gouvernement légal peut fermer tout ou partie des ports du pays par voie d'autorité, par mesure de police, sans y établir, á proprement parler, un blocus.

that the "denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents." *Foreign Relations of the United States*, 1885, p. v.

FRED K. NIELSEN,
Commissioner.

G. L. SOLIS *v.* THE UNITED MEXICAN STATES (Docket No. 3245)

Opinion rendered October 3, 1928

Affidavits have been used extensively in arbitrations in different parts of the world for a century. Therefore, the Commission cannot regard them as being without any probatory force. The divergence of views between the parties probably results from differences and local customs and practices in their respective countries. However, this Commission is an international tribunal, and it is its duty to receive, and to appraise in its best judgment, the evidence presented to it in accordance with the arbitral agreement and international practice.

Citizenship is a domestic matter in no way governed by international law, although multiplications of nationality frequently result in international difficulties. No concrete rule of international law has been formulated with regard to proof of nationality, but it is certain that an international tribunal should not ignore the law and practice of the claimant government.

In dealing with the question of responsibility for the acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an immediate factor in relation to the question of power to give protection.

In defense of the claim for the value of cattle said to have been taken by Federal forces, the Government of Mexico invokes the well recognized rule of international law that a government is not responsible for malicious acts of soldiers committed in their private capacity. There is evidence that about 100 soldiers were camped on claimant's property for about a month. In the absence of definite information concerning the precise situation of the troops, it must be taken for granted that some officer was charged with responsibility for their situation and acts.

Counsel: United States, John J. McDonald, Assistant Agent; Mexico, Oscar Rabasa.

COMMISSIONER NIELSEN, *for the Commission:*

Claim is made in this case by the United States of America in behalf of G. L. Solis to obtain compensation for cattle said to have been taken by Mexican soldiers from the claimant's ranch, called Morales, in the State of Tamaulipas, Mexico, in 1924. The claim consists of two items, one of $535.00 for cattle alleged to have been taken by "de la Huerta revolutionary forces," and one of $120.00 for cattle alleged to have been taken by Mexican federal forces. A "proper amount of interest" is asked for in the memorial.

In the answer of the Mexican Government it is alleged that "The American nationality of the claimant does not appear duly proven." Some point is made of a discrepancy in the record with respect to the given name of the claimant, and with respect to an explanatory affidavit accompanying the memorial, it is stated that it "is wanting in any probatory force, inasmuch as it is *ex parte*." These contentions were forcefully and in much detail elaborated by counsel for Mexico in oral argument and in the Mexican brief.

Affidavits have been used by both parties in the pending arbitration. Use has been made of them extensively in arbitrations in different parts of

the world for a century. And in Article III of the convention of September 8, 1923, Mexico and the United States stipulate that they may be used before this Commission. It is unnecessary to observe, therefore, that the Commission can not regard them as being without any probatory force.

The divergence of views between counsel for the respective parties in the arbitration probably results to some extent from differences in local customs and practices in the two countries. However, this Commission is an international tribunal, and it is its duty to receive, and to appraise in its best judgment, evidence presented to it in accordance with arbitral agreement and international practice.

The records before the Commission contain correspondence between the two governments, communications of various kinds contemporaneous with the occurrences pertaining to claims, and documents evidencing transactions entering into these claims. It is of course necessary in cases tried either before international courts or domestic courts to obtain evidence with regard to occurrences out of which claims arise. Testimony of witnesses may be offered, subject to cross-examination, but obviously in international arbitrations this procedure is seldom practicable. No oral testimony has heretofore been offered to the Commission. Sworn statements and unsworn statements have been laid before the Commission. Unquestionably it is true, as has been argued before the Commission, that affidavits used before domestic courts have contained false statements, but it does not follow that, because false testimony may be revealed in a given case that there is a presumption that all testimony is false, and that a form of evidence sanctioned by the arbitral agreement and by international practice can not be used profitably. When sworn statements instead of unsworn statements are employed in an international arbitration it is undoubtedly because the use of an affidavit in an arbitration is to some extent an approach to testimony given before domestic tribunals with the prescribed sanctions of judicial procedure. When sworn testimony is submitted by either party the other party is of course privileged to undertake to impeach it, and, further, to analyze its value, as the Commission must do.

Due no doubt in a measure to local custom and practice but slight use of affidavits have been made by the Mexican Government in the pending arbitration. As has been pointed out to the Commission, and as it is doubtless well known, affidavits are used extensively in the United States by administrative and by judicial officials. Citizenship is a domestic matter in no way governed by international law, although multiplications of nationality frequently result in international difficulties. It has sometimes been said that, since obviously nationality of a claimant must be determined in the light of the law of the claimant government, proof adequate to establish citizenship under that law must be considered sufficient for an international tribunal. Even if this view be not accepted without qualification, it is certain that an international tribunal should not ignore

local law and practices with regard to proof of nationality. The liberal practice in the United States in the matter of proving nationality in the absence of written, official records is shown by numerous judicial decisions. See for example, *Boyd* v. *Thayer*, 143 U. S. 135. It requires only a moderate measure of familiarity with international arbitral decisions, many of which are conflicting, to know that no concrete rule of international law has been formulated on this subject of proof of nationality.

A certificate of baptism showing that the claimant was baptized at Brownsville, Texas, in 1883, accompanies the memorial. It is doubtless true that a birth certificate would have been more convincing evidence, in view particularly of the fact that the date of baptism is recorded as May 1, 1883, and the date of birth appearing in the certificate is September 13, 1882. To be sure, the claimant might have been born in one country and as an infant taken into another country and baptized there, but the Commission can not assume this to be a fact, and in the light of explanatory affidavits accompanying the reply, the Commission is justified in reaching the conclusion that he was born in the country in which he was baptized. Irrespective of minute criticisms and speculations that might be made with regard to the affidavit of George Champion, a man 75 years of age, who swears that he is intimately acquainted with the family of the claimant, and that the claimant and his mother and father were born in Texas, there is no reason to disregard the testimony which he offers or to consider it to be unconvincing. The same is true with regard to the affidavit of J. A. Champion, who explains that he possesses similar knowledge concerning the Solis family. It is doubtless well known that birth certificates are often not available among official records in the United States.

A question has been raised with respect to dual nationality. The argument of counsel for Mexico on this point, involving a supposition that the claimant may possess Mexican as well as American nationality, apparently was predicated solely on the fact that claimant's name appears to be of Spanish origin. The prevalence of Spanish names in territories of the United States bordering on Mexico is probably a matter of very general information, and in any event, this fact is of course easily explainable when it is recalled that slightly more than a century ago Texas was Spanish territory, and within a somewhat less period it was Mexican territory. With respect to this point it may be significantly noted that from the certificate of baptism it appears that the names of the clergyman who baptized the claimant and of two sponsors are probably of Spanish origin, and evidently in any event, not of American origin. The same is true with regard to the name of the official who, on June 5, 1925, issued a copy of the certificate at Brownsville.

In the light of the evidence and applicable law, the Commission can not properly reject the claim on the ground of inadequate proof of nationality, or reject it on some theory that the United States is espousing a claim of a person possessing Mexican as well as American nationality.

In view of the nature of the evidence adduced by the United States in support of the claim for compensation for cattle said to have been taken by insurgent troops, the disposition of this item presents no considerable difficulty. To be sure, it is alleged in the memorial that the cattle were taken by de la Huerta revolutionary forces, and that federal troops stationed in force in the locality of the claimant's ranch made no effort to capture or defeat the de la Huerta troops or to protect or to recover the property of the claimant. And there is some evidence to support these allegations, but that evidence is very general in terms and from the oral argument made by counsel for the United States, it appears that he was uncertain as to the character of the soldiers who took the property. The evidence presented as to the alleged failure of Mexican authorities to give protection to the property, is admitted by counsel to be scanty. With respect to a point of this kind the Commission has repeatedly made clear the obvious fact that it must have convincing evidence.

In the Mexican brief and in oral argument it was contended that Mexico can not be held responsible for the taking of cattle by revolutionary forces.

In the claim of the *Home Missionary Society* presented by the United States against Great Britain under an arbitral agreement signed August 18, 1921, the arbitral tribunal in its opinion discussed the principles applicable to responsibility for the acts of insurgents. In that case claim was made in behalf of an American religious body for losses and damages sustained during a native rebellion in 1898 in the British protectorate of Sierra Leone. It was contended that the revolt was the result of the imposition and attempted collection of a so-called "hut tax"; that it was known to the British Government that this tax was the object of native resentment; that in the face of danger the British Government failed to take proper steps for the protection of life and property; that loss of life and damage to property were the result of negligence and failure of duty; and therefore the British Government was liable to pay compensation. The British Government in defense of the claim stressed the unexpected character of the uprising and the lack of capacity on the part of British authorities to give protection in vast unsettled regions.

The tribunal declared that, whatever warning the British authorities may have had with regard to possible disturbances, it was not such as to lead to apprehension of a revolt such as occurred, and with respect to the law applicable to the case the tribunal said:

> It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. (Moore's *International Law Digest*, Vol. VI, p. 956; VII, p. 957; Moore's *Arbitrations*, pp. 2991–92; British Answer, p. 1.) American Agent's *Report*, p. 425.[1]

[1] This JOURNAL, Vol. 15 (1921), p. 294.

The tribunal also referred to the difficulty of affording on a few hours notice "full protection to the buildings and properties in every isolated and distant village," and stated that there was no lack of promptitude or courage alleged against the British troops, but that on the contrary, evidence proved that "under peculiarly difficult and trying conditions they did their duty with loyalty and daring." The claim of the United States was dismissed, but the tribunal recommended that as an act of grace some compensation be made to the claimants.

In the opinion of Mr. Plumley, Umpire in the British-Venezuelan arbitration of 1903, reference is made to the following provision, as declaratory of international law, found in a treaty concluded in 1892 between Germany and Colombia:

> It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for the injuries, oppressions, or extortions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government. Ralston, *Venezuelan Arbitrations of 1903*, p. 384.

Following the quotation of this provision, Mr. Plumley said:

> It is also held that the want of due diligence must be made a part of the claimant's case and be established by competent evidence. This is brought out in the treaty of Italy with Colombia in 1892, where the language is "save in the case of *proven* want of due diligence on the part of the Colombian authorities or their agents," and such a requirement is strictly in accord with the ordinary rules of evidence. *Ibid.*

It will be seen that in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection.

In the light of the general principles referred to above, the item of $535.00 in the instant claim must clearly be rejected, in the absence of convincing evidence of neglect on the part of Mexican authorities.

The item of $120.00 for the value of cattle said to have been taken by federal forces involves questions less simple.

In defense of the claim for this item, the Government of Mexico invokes the well-recognized rule of international law that a government is not responsible for malicious acts of soldiers committed in their private capacity and, further, alleges that the taking of property by federal soldiers has not been adequately proved.

The allegation in the memorial on this point is to the effect that federal troops were encamped on claimant's ranch, and while there, took, killed and

used as food, the cattle for which compensation is asked. As was observed in the opinion rendered by this Commission in the claim of *Thomas H. Youmans*, docket No. 271, (*Opinions of the Commissioners, U. S. Government Printing Office, Washington, 1927*, p. 150, 158)[2] certain cases coming before international tribunals may have revealed some uncertainty whether acts of soldiers should properly be regarded as private acts for which there is no liability on the state, or acts for which the state should be held responsible. In the absence of definite information concerning the precise situation of the troops, the Commission must consider whether it is warranted in assuming that the soldiers encamped on the claimant's ranch were a band of stragglers for whom there was no responsibility, or that they must have been under the direct command of some officer, or that responsibility for their location and activities rested with some officer, in the seemingly strange event that no responsible officer was in immediate command. I am of the opinion that it cannot reasonably be assumed that the soldiers were stragglers for whom there is no responsibility. I think it must be taken for granted that some officer was charged with responsibility for their station and acts. There is evidence in the record which has not been refuted that about 100 soldiers were camped on the ranch for about a month. Some light on a situation of this kind may, I think, be found in an analysis of cases made by the tribunal under the special agreement of August 18, 1910, between Great Britain and the United States, in the opinion written in the claim of the *Zafiro*, presented by the United States against Great Britain.[3] American Agent's *Report*, pp. 583–84. The tribunal, after citing cases dealing with questions of responsibility for acts of soldiers, said:

> These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In Donougho's Case, 3 Moore, *International Arbitrations*, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the "posse" became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In Rosario & Carmen Mining Company's Claim, *Id.* 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate who called out the posse in not putting it in charge of a proper person or being present himself 'to restrain the violence of such an excited body of men.' In Jeanneaud's Case, 3 Moore, *International Arbitrations*, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not use the ordinary means of military discipline to prevent it, and their government was held liable. In the Mexican Claims, 3 Moore, *International Arbitrations*, 2996–7, a government was held liable where the officers failed to restrain such actions after having had notice thereof. (See also

[2] This JOURNAL, Vol. 21 (1927), p. 571.
[3] *Ibid.*, Vol. 20 (1926), p. 385.

> Porter's Case, *Id.* 2998.) And in the Case of Dunbar & Belknap, *Id.* 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers.

The difficulties confronting the Commission because of the nature of the records in this case are obvious. On the one hand, the evidence produced by the United States is properly referred to as scanty. On the other hand, no evidence at all accompanies the answer of the Mexican Government in which appears the following paragraph:

> The Agency of Mexico has made any kind of efforts to obtain data in relation with the facts on which it is pretended to base this claim, concerning the stock that it is alleged was taken by Federal forces. The document filed as Annex to this answer, shows the only result that said efforts have produced up to the present. If at a later time more information is obtained, the same will be placed in due time before the Honorable Commission, in case it be in accordance with the rules.

It is asserted in the Mexican brief that the affidavits accompanying the memorial on which allegations with respect to the action of federal soldiers are based are altogether too vague to warrant the conclusion "that the taking of the cattle was ordered by any commanding officer or even that the alleged soldiers at the time of taking the cattle were under the command of any officer." In the absence of any evidence from the civilian or military authorities of Mexico destroying the value of the affidavits presented by the United States, the Commission would not be justified in considering them without evidential value. An affidavit is furnished by José T. Rivera, who states that while he was in the employ of the claimant and attending the latter's cattle about one hundred federal soldiers by force and threats carried away the animals for which compensation is sought. In the absence of impeaching testimony it seems to be proper to attribute reliability to a man who had, as he swears, for five years attended the ranch of his employer. The testimony given by Rivera was confirmed by an affidavit of Rosendo Jaramio, who swears that he lived at the Morales Ranch for the past fifteen years; that he is familiar with the brand Solis used on the stock at Morales Ranch which has been used there for many years and which is well known to the people of that vicinity; that federal soldiers encamped on the ranch about a month; that he talked to the soldiers and saw them take and kill cattle. The claimant himself swears that he verified the information concerning these occurrences which were communicated to him by his manager. It is not perceived that there is any good reason to believe either that for some reason the two Mexicans furnished false information, or that the claimant has fabricated a false claim for a comparatively small amount.

The values on which the item of $120.00 was predicated have not been contested, and the claimant should therefore have an award for this sum with interest from November 24, 1924.

Decision

The claim is disallowed with respect to the item of $535.00.

The United Mexican States shall pay to The United States of America in behalf of G. L. Solis, the sum of $120.00 (one hundred and twenty dollars) with interest at the rate of six per centum per annum from November 24, 1924, to the date on which the last award is rendered by the Commission.

Done in Mexico, D. F., this 3rd day of October, 1928.

KRISTIAN SINDBALLE,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

GEORGE W. MCNEAR, INCORPORATED, *v.* THE UNITED MEXICAN STATES (Docket No. 211)

Opinion rendered October 10, 1928.

Wheat shipped by rail from the United States to Mexico consigned to the order of the shipper, the bills of lading being sent to a local Mexican bank accompanied by sight drafts for the purchase price, with instructions to deliver the bills of lading only upon payment of the drafts, did not become the property of the purchaser, who had fled before the arrival of the wheat upon being charged with the clandestine importation of other wheat without paying the consular fees and customs duties thereon, but remained the property of the American shipper under a conditional sale. The issuance of a consular invoice covering the goods in question could not alter the legal position of the parties, as such a document does not confer any title to the goods in the person to whom it is issued.

From the moment that the Mexican customs authorities, who had seized the wheat as security for the purchaser's pecuniary responsibility to the treasury, were informed that the bills of lading were in the hands of the Mexican bank and could be delivered to the buyer only on payment of the purchase price, it ought to have been perfectly clear to those authorities that the wheat should be released. From that moment their retention of the wheat constitutes a violation of a rule that is of fundamental importance to commerce and with which they should have been familiar. For this violation, the Commission holds Mexico responsible under international law, notwithstanding that possibly the claimant might have had his right recognized if he had brought a formal action before the Mexican court.

Counsel: United States, Clement L. Bouvé, Agent; Mexico, Eduardo Suárez.

The Presiding Commissioner, DR. SINDBALLE, *for the Commission:*

During May and June 1907 George W. McNear, an American citizen, now deceased, sent two carloads of wheat, sold to S. Montemayor, Ciudad Juárez, Mexico, on a cash basis, by the Southern Pacific Railroad, one, containing 610 sacks, valued at $1124.90, U. S. currency, from Portland, Oregon, in car No. 83074, and the other, containing 479 sacks, valued at $1019.90, U. S. currency, from Port Costa, California, in car No. 30758. The Southern Pacific Railroad issued bills of lading according to which the two shipments were consigned to the order of McNear, Ciudad Juárez, via El Paso, where S. Montemayor, care of J. T. Woodside, was to be notified. Sight drafts for the purchase price were sent to the agency of the Banco Minero at Ciudad Juárez for collection. The bills of lading were attached to those drafts, and

the bank was instructed to deliver the bills of lading to Montemayor upon payment of the drafts only.

In El Paso the two cars with wheat were transferred to the Mexican Central Railway, by which they subsequently were taken to Ciudad Juárez. It seems that Montemayor or a representative of him took care of having the necessary consular invoice issued, and that he had such an invoice covering besides the two carloads sold him by McNear a third carload of wheat sold him by the Nash-Ferguson Grain Company of Kansas City, Missouri, issued to himself.

At the time when the carloads in question arrived in Ciudad Juárez, Montemayor was charged with having imported in a clandestine manner fourteen carloads of wheat without paying consular fees and customs duties thereon. Because of that charge he had fled from the town.

Acting on the belief that the two carloads shipped by McNear as well as the carload shipped by the Nash-Ferguson Grain Company were the property of Montemayor or in his possession, the customs authorities in Ciudad Juárez requested the District Court to order a seizure of the three carloads in order to establish a security for the treasury with regard to the pecuniary responsibility that might be imposed upon Montemayor. This request was complied with by the court. Afterwards a representative of the Banco Minero as well as the American consul at Ciudad Juárez tried to obtain the release of the goods by application to the court. They pointed to the fact that the bills of lading were in the possession of the bank and that according to a notation on the drafts, they should not be delivered to Montemayor until he paid the drafts, which he had failed to do. Their intervention, however, was opposed by the administrator of the customs house as well as by the agent of the Ministerio Público at Ciudad Juárez, both of whom asserted that the carloads in question had been imported by Montemayor and that he would not have been able to dispose of them, as in fact he did, unless he had paid for them at El Paso. The decision of the court was to the effect that no release could be ordered, but that a provisional delivery of the wheat could be made on payment of the duties and deposit of the value of the wheat, which amount in due time would have to be delivered to its legitimate owner. It is said in the decision that the proceedings which were being held were those of the summary character referred to in Article 608 of the Customs House Ordinance, and that the court was "unable at present to render any opinion as to the rights which may be had with regard to the attached property." The decision evidently implies, in accordance with Mexican law, that the shipper of the wheat, in order to protect his alleged right of property, would have to bring a formal action before the court. McNear, however, did not adopt this course, but some years after he petitioned the Mexican Government to order the customs house in Ciudad Juárez to pay him $2,426.57, U. S. currency, namely the value of the wheat owned by him and seized by said customs house. At that time the wheat had long ago

been auctioned, and the revenue, deduction having been made for import duties and freight due on the goods, had been deposited with the court. The government rejected McNear's petition. It was argued that, according to Art. 2822 of the Mexican Civil Code, a thing sold belongs to the buyer as soon as there is an agreement between buyer and seller with regard to the sale, and that, according to Art. 657 of the Customs House Ordinance, McNear's right to claim the amount deposited with the court as the balance left from the revenue of the auction sale of the wheat was lost by prescription. At first it was further argued that a business transaction between McNear and Montemayor had taken place when the goods arrived at El Paso, but later on it was admitted that this supposition was erroneous.

Claim is now made against the United Mexican States by the United States of America on behalf of G. W. McNear, Incorporated, an American corporation, to which, prior to his death, George W. McNear assigned amongst other things, "all book accounts, debts, claims and demands" belonging to or pertaining to his business, for damages for wrongful seizure of the wheat in question in the sum of $2,144.80, U. S. currency, with interest thereon at 6 per cent from July 25, 1907, the date when the seizure is alleged to have taken place.

In the opinion of the Commission there can be no doubt that the detention of the wheat was wrongful. The sale of the wheat to Montemayor was a conditional sale. The intention of the parties to the contract of sale was that the ownership and the possession of the goods should not pass to the buyer before payment of the purchase price had taken place. Upon such a case Art. 2822 of the Mexican Civil Code does not bear, this article being applicable only so far as the parties have not agreed otherwise, and the issuance of a consular invoice covering the goods in question could not alter the legal position of the parties with regard to the goods as such a document does not confer any title to the goods in the person to whom it is issued. It is possible that the court was justified in ordering the seizure of the goods in the course of proceedings of a summary character, in which it was stated by the customs authorities that the goods had been imported by Montemayor. But from the moment the customs authorities were informed that the bills of lading were in the hands of the Banco Minero and could be delivered to the buyer on payment of the purchase price only, it ought to have been perfectly clear to those authorities that the wheat should be released. From that moment their retention of the wheat constitutes a violation of a rule that is of fundamental importance to commerce and with which they should have been familiar. For this violation the Commission holds that Mexico must be responsible under international law, notwithstanding that possibly McNear might have had his right recognized, if he had brought a formal action before the court. The Commission further holds that the amount to be awarded must be the value of the wheat.

[Separate opinion of Nielsen, Commissioner, omitted.]

Decision

The United Mexican States shall pay to the United States of America on behalf of G. W. McNear, Incorporated, $2,144.80 (two thousand one hundred forty-four dollars and eighty cents) with interest at the rate of six per centum per annum from July 25, 1907, to the date on which the last award is rendered by the Commission.

Done in Mexico, D. F., this 10th day of October, 1928.

KRISTIAN SINDBALLE,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

NORMAN T. CONNOLLY AND MYRTLE H. CONNOLLY *v.* THE UNITED MEXICAN STATES (Docket No. 265)

Opinion rendered October 15, 1928

Mexico held pecuniarily liable for the laxity of officials in the prosecution of crime against American citizens, which laxity can only partly be considered as redressed by the arrest and sentence of the criminals.

Counsel: United States, Carlyle R. Barnett; Mexico, Enrique Munguía, Jr.

The Presiding Commissioner, DR. SINDBALLE, *for the Commission:*

On the morning of August 16, 1919, the American lieutenants, Cecil H. Connolly and Frederick D. Waterhouse, both of whom were attached to the Ninth Aero Squadron, stationed at San Diego, California, were detailed to field patrol. Owing to a mechanical defect or some mishap the aeroplane in which they were flying never returned to its base. It was later found on the open beach at Refugio de Guadalupe, and it was disclosed that the two lieutenants had spent about seventeen days at that place without food and that thereafter two Mexican fishermen, Calixto Ruiz, called La Changa, and Santiago Fuerte, had given them food and taken them to Los Angeles, Lower California, where they killed them on or about September 9.

On October 19, 1921, the Judge of the First District Court at Tijuana, Lower California, sentenced the two fishermen to six years imprisonment for homicide during a fight. The case was appealed to the Fifth Circuit Tribunal at Hermosillo, Sonora, and on April 22, 1922, this court substantially confirmed the judgment of the lower court, only the terms of imprisonment were fixed at five years and six months for Ruiz, and five years for Fuerte.

Claim is now made against the United Mexican States by the United States of America on behalf of Norman T. Connolly and his wife Myrtle H. Connolly, Americans citizens and the parents of Lieutenant Cecil H. Connolly, for damages in the sum of $60,000, U. S. currency. The claim is

predicated on the allegations that (1) Mexican authorities sought to cover up all matters incident to the death of the two aviators and failed to take prompt measures to investigate the murder and bring about the apprehension of the criminals, that (2) the latter ought to have been prosecuted for robbery as well as for homicide, and (3) that the punishment meted out to the murderers was inadequate.

It seems impossible with any degree of certainty to reach a conclusion regarding the motive of the crime. The murderers pleaded that they had acted in self-defense, the aviators not having been satisfied with the food the murderers prepared for them, and one of the aviators having attacked one of the murderers, whereupon a fight followed. The United States alleges that this statement is in itself most improbable, and pointing to the fact that the declarations of the two criminals were at variance in nearly all particulars they assert that no consideration ought to have been given to those declarations. It is further asserted that robbery no doubt had been the motive of the crime, as the criminals were in possession, after the murder, of several objects belonging to the aeroplane or to the aviators personally. The criminals, on the other hand, explained that the aviators had made them a present of the aeroplane because of their aid. Against the theory of robbery as the motive of the crime it might also be argued that at first the two fishermen had aided the aviators and given them food.

The Mexican courts rejected the plea of self-defense, but, as already mentioned, they based their judgments on the supposition that the murder had been committed during a fight. The Commission is of opinion that those judgments cannot be considered as constituting a denial of justice.

It cannot but produce an impression of laxity, however, that no prosecution for robbery or theft was instituted. And this impression becomes stronger when some of the facts surrounding the discovery and the investigation of the crime and the apprehension of the murderers are examined. An American citizen, Joseph Allen Richards, who had found the dead bodies of the two aviators, and who at Santa Rosalía boarded an American steamer in order to inform the captain of his discovery, was arrested on—as it seems—rather specious charges of having molested corpses before an inquest had been held and of having robbed the dead bodies of some articles. On November 10, 1919, the First District Court of Lower California, having been requested by the Ministerio Público to issue warrants of apprehension against Ruiz and Fuerte, refused to issue such warrants, although it followed with great probability from testimony given by several persons during investigations undertaken by the United States with the coöperation of Mexican authorities that the said persons were the murderers. When later on, on February 17, 1920, Ruiz had been arrested by the police authorities, the same judge ordered his release, but Ruiz had then already confessed that he and Fuerte had murdered the aviators and therefore the order of the judge was not executed. A warrant for the arrest of Fuerte was not issued until

January 13, 1921, at which time it appears that the record in the case, together with the prisoner Ruiz, had been transferred to the Second District Judge of Lower California. On April 12, 1921, Fuerte was arrested. It seems that he presented himself voluntarily.

For the laxity thus shown by some Mexican officials in the prosecution of the crime committed, Mexico must be responsible under international law, and as this laxity can only partly be considered as redressed by the arrest and sentence of the criminals, the Commission is of opinion that an amount of $2,500, U. S. currency, should be awarded.

Decision

The United Mexican States shall pay to the United States of America on behalf of Norman T. Connolly and Myrtle H. Connolly $2,500. (two thousand five hundred dollars), without interest.

Done in Mexico, D. F., this 15th day of October, 1928.

KRISTIAN SINDBALLE,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

WILLIAM T. WAY *v.* THE UNITED MEXICAN STATES (Docket No. 2362)

Opinion rendered October 18, 1928

Claim based on an assertion of a denial of justice growing out of the failure of the Mexican authorities adequately to punish a person said to have been responsible for the murder of an American citizen disallowed; but claim based on responsibility of Mexico for the officials whose acts caused the death of the American allowed, although this contention was for the first time explicitly raised in oral argument.

Under Mexican law, an alcalde is classified as a member of the "judicial police." Under international law, a nation is responsible for the conduct of judicial officers. However, there are certain other broad principles with respect to personal rights, which appear applicable to the instant case. These principles are recognized by the laws of Mexico, the laws of the United States, under the laws of civilized countries generally, and also under international law. There must be some ground for depriving a person of his liberty. He is entitled to be informed of the charge against him if he is arrested on a warrant. Gross mistreatment in connection with arrest and imprisonment is not tolerated and it has been condemned by international tribunals. Guarantees of this nature were violated when the alcalde issued a void warrant, stating no charge, and directed its execution by armed men who killed a cultured and inoffensive man. For this tragic violation of personal rights, it is proper to award an indemnity in favor of the claimants, the collateral relatives of the decedent.

Counsel: United States, Clement L. Bouvé, Agent, and Carlyle R. Barnett; Mexico, Oscar Rabasa.

COMMISSIONER NIELSEN, *for the Commission:*

Claim in the amount of $25,000.00 is made in this case by the United States of America against the United Mexican States in behalf of William T. Way, individually, and as guardian of the person and estate of John M. Way, Jr. The former is a half-brother and the latter a brother of Clarence Way,

an American citizen, who was murdered at Aguacaliente de Baca, State of Sinaloa, Mexico, 1904. The claim is based on an assertion of a denial of justice growing out of the failure of Mexican authorities adequately to punish one of the persons said to have been responsible for the murder of Way, and further based on the contention that Mexico is responsible for officials whose acts caused the death of Way. This contention was for the first time explicitly raised in oral argument.

The following allegations, briefly summarized, are made in the memorial with respect to the death of Clarence Way and with respect to complaints made against Mexican authorities:

Clarence Way was employed as superintendent of the Mescal Works of William V. Lanphar, located at Aguacaliente de Baca, State of Sinaloa, Mexico. On the evening of July 18, 1904, Hermolao Torres, Alcalde of Aguacaliente de Baca, mounted on a mule, approached the store operated by Way as superintendent. As Torres drew near he pointed a pistol at Way, who was near enough to push it to one side. Torres then spurred his mule, and Way was compelled to release his grip on the pistol. Way then walked towards his house, followed by Torres, who kept shouting that he would shoot Way if the latter did not stop. The reason assigned by Torres for his conduct was that he had passed Way during the day and Way had not saluted him with the respect which was due him as an official. Torres, leaving Way, proceeded to the house of one Arcadio Uzarragui. Without any explanation he ordered Uzarragui and one Vicente Gil to go at once to the house of Way and arrest him and a man named Latimer, who was cooking for Way, telling them to hurry and go to Lanphar's house and bring those gringos to him (Torres) by such means as might be necessary to employ. These men, observing that Torres was under the influence of liquor, did not obey the order given them by Torres, but merely told Way that Torres wanted to see him. Torres was much incensed at the action of the men he had sent and said he would get men at Baca who would carry out his orders.

On the following morning, July 19th, about 5:30 o'clock, Diego Miranda, a clerk in the store conducted by Way, observed two men sitting at the gate in front of the store, one of whom was armed with a pistol and the other with a Winchester rifle. Soon thereafter Way came out of his house, partly dressed, carrying a feed bag in his hand. One of the men presented Way with a writing and informed the latter that it was from Torres. The order which had been issued by Torres and delivered to Castro and Carrasco was found in the pocket of Way, where he had placed it when it had been shown to him by the two men, and was as follows:

> To Messrs. Fidel Carrasco and Francisco Castro:
>
> Proceed with this warrant to the Hacienda of Aguacaliente de Baca and by order of this court, under my charge cause to appear the representative of said Hacienda at this court, and I hereby instruct you, in case that person refuses to accompany you as you are ordered, to use

such means as may be suitable in order that the mission with which you are charged may be fulfilled. Lib. and Const. July 18, 1904. Hermolao Torres, alcalde.

Way read the paper and remarked, "all right," further saying that he would return with them to Baca to see the judge (Torres) just as soon as he could finish dressing and eat his breakfast. Fidel Carrasco, one of the men, replied that the judge had given them orders to take Way at once and refused to permit him to go inside the house. Way repeated that he would accompany them, but that he wanted to finish dressing and have his breakfast before going. Carrasco then seized Way and began pulling him along towards the front gate, calling to Francisco Castro, his companion, to help him. Way called for help. Latimer, the cook, came out of the house, unarmed, and asked the men to desist, saying that Way would go with them as soon as he dressed. Latimer, anticipating no further trouble, went inside to finish preparing breakfast. Soon thereafter he again heard cries for help from Way, and immediately returned, unarmed, as before. The two men were attempting to carry Way bodily. Latimer hurried up and grappled with Castro, who was armed with a rifle, and in the struggle they both fell to the ground. As they arose Castro shot Latimer in the back with his rifle and then shot Way, who was being held by Carrasco. Way implored Castro not to shoot and stated that he would go to the Alcalde. Castro shot a second time, and Way fell dead at Carrasco's feet. Latimer was removed to the house and died shortly afterwards.

About two hours after the shooting Torres arrived at the scene of the tragedy and proceeded to review the remains in his capacity as judge for the purpose, he said, of making a report of the facts. A few hours after the arrival of Torres the *Síndico* from Baca also arrived, and in his official capacity undertook to make an investigation of the whole affair.

The Judge of the Court of First Instance, upon being officially advised of the facts connected with the murder, caused the arrest of Torres, Castro and Carrasco, and had them placed in confinement under a charge of having murdered Way and Latimer, and thereupon began an investigation of the facts for the purpose of a trial.

At the trial which was had soon after the killing, many witnesses appeared and gave evidence. All the material facts in connection with the entire affair were fully presented. It was contended by the prosecution that the person primarily responsible for the murder was Torres. It was shown that no offense of any kind had been committed by Way; that Torres had no legal authority to issue a warrant for the arrest of Way; that the warrant or order which he did issue was illegal in form; and that he was so advised by the *Síndico*. The order or warrant stated no offense on the part of Way and it was violative of Article 16 of the Federal Constitution which provides that "No person shall be molested in his person, family, domicile, papers or pos-

sessions, except by virtue of an order in writing of the competent authority, setting forth the legal grounds upon which the measure is taken."

A paper which was found on the person of Torres at the time of his arrest, and which was introduced at the trial, indicated that he desired to have it appear that the deputies, or persons to whom the order of arrest had been delivered, had killed Way in self-defense. The paper read as follows:

> If the Director requires or orders you to make an investigation and gives you particulars concerning the case, I recommend you to tell him that you know that the reason why I commissioned Fidel and Francisco to summon the Gringo to appear was because the latter failed to respect my authority, and that the said commissioned persons, upon the Gringo refusing to obey the summons and throwing himself upon them in order to disarm them, were compelled to make use of their weapons, for although only one of the persons had been summoned, the other Gringo, his companion, allied himself with the one summoned, and it was when they ran to get their weapons that they were fired upon, after a long and tiresome struggle, one of them (the commissioned persons) having received blows, as is known.

At the conclusion of the trial in the Court of First Instance, Torres was sentenced to ten months in jail and fined 500 pesos, or twelve months in jail in default of payment of the assessed fine. Castro was found guilty of murder and sentenced to death. Carrasco was found not guilty and released from custody.

An appeal was taken from the judgment of the Court of First Instance to the Supreme Court of the State of Sinaloa which rendered its final decree. Torres was sentenced to confinement in jail for a year and fifteen days, the period of confinement dating from the day of his arrest. Carrasco was sentenced to imprisonment for a period of ten years and six months. The death penalty on Castro was confirmed.

Some diplomatic correspondence was exchanged between the United States and Mexico regarding this case. Following the decision of the lower court, the Department of State of the United States sent an instruction to the American Ambassador at Mexico City in which he was authorized, in the exercise of his discretion, informally to bring the case to the attention of the Mexican Government and to say that, while the Department disclaimed the least desire to interfere in the internal administration of justice in Mexico, it would take the liberty to communicate the painful impression produced by an examination of the record in the case. It was stated that the evidence clearly showed that Torres, in issuing the order for the arrest of Way, put a revolver in the hands of Carrasco, instructing him to lend his rifle to his companion, Castro, and gave the order that they should arrest Way in whatever manner they found suitable. It was observed that in such a case, in the courts of the United States, Torres would be considered jointly guilty with the other actors in the proceeding.

The conclusions submitted in this note and in the allegations made in the memorial as to the guilt of Torres were not sustained by either the higher or the lower Mexican court which passed upon the charge made against Torres. The higher court held that for lack of evidence Torres should be acquitted of responsibility for the murder.

It was contended in behalf of the United States in the written and the oral argument that the sentence passed on Hermolao Torres, in whose mind the murder was premeditated and the punishment inflicted were wholly inadequate and not commensurate with his guilt, and that the decree as to him appears to have been rendered under circumstances that would indicate there had been a distinct denial of justice. Evidence in the record shows, it was asserted, that Torres had boasted that his political and his family connections would protect him from the infliction of any serious punishment. It was alleged that the sentence of the court with respect to Torres was not in accordance with the facts, and that it bears unmistakable evidence of intentional leniency towards him.

It was argued that Torres was the instigator and actual author of the crime; that those who did the killing were merely his tools for the consequences of whose acts he must be considered to be responsible; that he should therefore have been punished for the crime of murder; and that the failure so to punish him resulted in a denial of justice for which the Government of Mexico is responsible. The criticism of the action of the court was apparently centered on two principal points. It was contended that provisions of the applicable Penal Code would have justified a sentence of Torres either as perpetrator of the crime or in any event, as an accomplice. And it was further argued that, had the court not failed to give proper application and weight to testimony presented at the trial, it would have been established that Torres had, before the issuance of the void order of arrest, given vent to expressions of malevolence towards Way and had given oral instructions to the men who killed Way which it might have been expected would result in murder. Among provisions of the code, cited by counsel with respect to persons responsible as perpetrators of crime were the following (Article 49 of the Penal Code):

> I. Those who conceive, resolve to commit, prepare and execute same, either by personal act or through others whom they compel or induce to commit the crime, the former taking advantage of their authority or power, or availing themselves of grave warnings or threats, of physical force, of gifts, of promises, or of culpable machinations or artifices;
>
> II. Those who are the determinate cause of the crime, although they may not execute it themselves, nor have decided upon it, nor prepared its execution, even when they avail themselves in ways other than those enumerated in the foregoing fraction of this article to cause others to commit same;
>
> V. Those who execute acts which are the determing cause from which the crime results, or who direct themselves immediately and directly

toward its execution, or who are so indispensable to the act necessary for the commission of the crime that without them such crime could not be committed;

The following provisions among others were cited with respect to persons responsible as accomplices (Article 50 of the Penal Code):

I. Those who aid the authors of the crime in the preparation of the same, furnishing them instruments, arms, or other adequate means for its commission, or giving them instructions to that end, or assisting in any other way its preparation or execution; provided that they know the use which is to be made of one or the other;

II. Those who, without availing themselves of the means spoken of in Paragraph I of the foregoing article, employ persuasion or incite passions for impelling another to commit a crime, if such provocation be one of the determining causes of the commission of the crime, but not the only one;

III. Those who in the execution of a crime take part in an indirect or accessory manner;

Mexico produced the sentence of the Court of First Instance and the sentence of the Supreme Court of Sinaloa. It is contended in the Mexican brief that these judicial pronouncements and the considerations of both law and fact which the Mexican courts had in mind in fixing the penalty imposed on Hermolao Torres are so clear that it is a waste of time to enter into a detailed analysis of the proofs; that the sentences reveal that there was no gross or palpable irregularity upon which an international delinquency could be predicated.

It was alleged that, whether Torres actually had in mind the desire or intention to cause the death of Way, which he possibly had, is immaterial; that the fundamental point in the case is that from the proofs in evidence before the courts, Torres could not have been found guilty of any offense other than the particular one for which he was finally sentenced in accordance with domestic law and procedure. These proofs, it is asserted, were wholly insufficient to establish that Torres had directed or aided in the murder of Clarence Way, and therefore it was the duty of the Mexican courts, in accordance with the provisions of Mexican law, to acquit Torres of the charge of murder, Article 175 of the Penal Code providing that an accused must be acquitted in case of doubt. There was nothing, it is asserted, in the proceedings before either the lower or the higher court to show that there was a manifest injustice in the trial and conviction of Torres, but that in the light of the evidence before the courts no greater conviction or penalty could have been imposed on Torres. Mexico's international obligations were fully complied with, it was argued, by the arrest and trial of Hermolao Torres, by the passing of final judgment on him, and by imposing the penalties which according to the laws of Mexico were applicable to the particular offenses committed by him. The defense made by Mexico is further shown by the following passage from their brief:

> The court in passing judgment upon Hermolao Torres, found that there was no proof of any other order having been given by him to Castro and Carrasco, than the written order hereinbefore referred to. While Castro on the one hand accepted that he and Carrasco received verbal instructions to the effect that if Clarence Way opposed the arrest, they should bring him the best way they could, Fidel Carrasco, on the other, testified that they had not received any verbal instructions besides the written order. Consequently, the court held that in view of the express text of the written order, Hermolao Torres could not be considered guilty of the crime of aggravated homicide because he was not embraced within any of the cases provided for in Article 49 of the Penal Code. . . .

Whatever may be said of some of the reasoning employed by the court, I am of the opinion that by a broad application of the principles which have guided the Commission in dealing with a charge of a denial of justice predicated on the decision of courts, the Commission may refrain from sustaining the charge in the instant case.

When counsel for the United States, at the outset of his oral argument announced that one of the grounds of the claim was based on the action of officials of the judiciary of the State of Sinaloa in committing acts to the injury of Clarence Way, counsel for Mexico objected that neither the memorial nor the brief mentioned this particular point, and he stated that therefore he had not been given a proper opportunity to meet it. The Agent of the United States contended that the memorial filed by him which is the pleading in which the foundation of a claim is laid adequately furnished a basis for argument with respect to direct responsibility.

The position of counsel for Mexico was sound. Undoubtedly the allegations of the memorial and the evidence accompanying it dealt not only with complaints with regard to the imposition of an inadequate sentence on Torres, but also with regard to his wrongful action in connection with the arrest of Way. However, in the memorial it was specifically stated that Torres "should have been punished for the crime of murder and the failure so to punish him was a miscarriage and denial of justice for which the Government of Mexico is responsible." And the American brief begins with the following sentence: "This claim is based upon the failure of authorities of the State of Sinaloa to punish one Hermolao Torres, Alcalde of Baca, Sinaloa, for complicity in the murder of Clarence Way, American citizen, at Aguacaliente de Baca, a place near Baca, on July 19, 1904." It seems to be clear therefore that counsel for Mexico had a right to assume that the United States had chosen to present a claim grounded merely on a charge of lack of proper prosecution, even though the memorial contained sufficient allegations and facts upon which the other cause of action, so to speak, might have been based.

The point so clearly made by the able counsel for Mexico is obviously an important one. The rules with considerable detail specify the averments

which the memorial shall contain as the grounds of the claim. But obviously the sufficiency of a memorial can not be solely determined on the basis of some quantitive measure of the allegations. The allegations must make clear the complaint presented. This was very aptly clarified by the use by counsel for Mexico for purposes of illustration, of a term of domestic law when he stated that the memorial must clearly reveal the "cause of action," or as may be said with reference to proceedings before an international tribunal, the precise character of the wrong of which complaint is made. The difficulty in the instant case is that the memorial, so far from doing this with respect to the issue of direct responsibility, by the language employed indicated, as observed above, that the claimant government had chosen to rely on the sole complaint of failure of adequate punishment of the wrongdoers, and counsel for Mexico was justified in making his defense on that theory.

The argument of counsel for the United States on the question of direct responsibility was deferred pending consideration of the objection made by counsel for Mexico. A proper solution of this unfortunate question of procedure was prompted by the action of counsel for Mexico, who, although objecting that he had been surprised by matters of which he had no notice, proceeded in his turn, to make a lengthy argument, for all of which he asserted there was foundation in the following allegation in the Mexican answer: "It is expressly denied that William T. Way and John M. Way, Jr., have any standing to claim an award or indemnification for the death of Clarence Way." The Spanish text of this sentence is as follows: "*Se niega la personalidad jurídica y el derecho que pretenden tener William T. Way y John M. Way, Jr., para pedir una indemnización por la muerte de Clarence Way.*" He explained that by legal standing he meant what is called in Spanish "the personality." Provisions of the rules with respect to the answer contain the following requirements:

> The answer shall be directly responsive to each of the allegations of the memorial and shall clearly announce the attitude of the respondent Government with respect to each of the various elements of the claim. It may in addition thereto contain any new matter which the respondent Government may desire to assert within the scope of the convention.

Technical rules of Mexican law with regard to "personality" of a claimant have no application in the present arbitration, and under the rules the meaning of words in Spanish is no more controlling than their meaning in English. The two parties to each case coming before the Commission are Mexico and the United States. The nationality of a claimant in any given case must be proved because that is determinative of the right of either government to espouse his claim. The merits of a claim must be determined in the light of international law which governs the relations of the two contracting parties. The general allegation with regard to the standing or right of a claimant could not give notice to a claimant government of any of the numerous

arguments discussed in oral argument by counsel, any more than a broad allegation in a memorial that a claimant has standing would afford a proper foundation for the discussion of a broad range of similar questions by a claimant government. Under the general allegation that the claimant has no "standing to claim an award" counsel discussed questions relating to nationality; the right of a half-brother to claim indemnity; the theory that one of the claimants is illegitimate; the standing of an insane person; the character of injuries that might be suffered by an insane person; the amount of the claim, including the subject of evidence bearing on the sum claimed; and other matters.

However, in the brief it is asserted that it was not proved that the claimants were dependent for support on the decedent during his life time, and in connection with this allegation it is contended that therefore they are not entitled to claim indemnity on account of the death of Clarence Way. With respect to the propriety of awarding indemnity in favor of collateral relatives, it is argued that the instant case should be differentiated from the cases of *Connelly and Youmans*, Dockets Nos. 270 [1] and 271.[2]

Procedure before the Commission does not permit the enforcement of the strictest kind of rules such as are applied by some domestic tribunals. Fair and efficient procedure is dependent in a considerable measure, as it should be, upon the conduct of counsel. A reasonable compliance with the provisions of rules with regard to the preparation of the memorial can not fail satisfactorily to acquaint the respondent government with the nature of the claim. And a similar compliance with the provisions of the rules with regard to the answer should undoubtedly result in fully informing the claimant government of the defenses made to a claim. The Commission has in the past endeavored to apply as rigidly as possible these rules to the end that all their advantages should be fully enjoyed by each party. Pertinent suggestions have been made by the Commission from time to time with this object in view.

Mention was made by counsel for Mexico of the *Massey* case, Docket No. 352.[3] In that case Mexican counsel presented a detailed oral and written argument with regard to non-responsibility for so-called minor officers, although neither the Commission nor the claimant government had notice of this argument until the filing of the brief. The Commission gave thorough consideration to these arguments, pointing out, however, with a view to promoting compliance with the rules, that the defense had not been advanced in the answer, and that it was questionable that it could properly have been advanced in the brief and oral argument.

On June 29, 1927, the Commission called attention to the purpose of the

[1] Opinions of the Commissioners, U. S. Government Printing Office, Washington, 1927, p. 159. [This JOURNAL, Vol. 21 (1927), p. 579.]

[2] *Ibid.*, p. 150. [This JOURNAL, Vol. 21 (1927), p. 571.]

[3] *Ibid.*, p. 228. [This JOURNAL, Vol. 21 (1927), p. 783.]

rules that the Commission and each party to the arbitration should be fully informed at the proper time regarding contentions advanced and evidence on which they are based. This action was taken in relation to answers filed by the Mexican Agent in two cases in one of which it was said:

> . . . no admission is made for the present, of any of the allegations contained in the several paragraphs of the memorial and in due time the Mexican Agent will formulate the proper defenses or exceptions in consonance with the new evidence to be received.

In the instant case the Commission adopted a course obviously fair to both parties, namely, to allow each of them necessary time in which to reply to new matters. For irrespective of what might have been a proper disposition of the question arising out of the indifferent preparation of the American memorial and brief, the Commission could not properly ignore Mexican counsel's departure from the answer and at the same time refuse to give consideration to important evidence accompanying the memorial and to applicable law.

The Mexican Agent declined to make a statement with regard to the time the Mexican Agency might require to present argument or evidence with respect to the question of direct responsibility, and stated he would be obliged before making any statement to the Commission, to consult his government. Subsequently, after consultation with his government, he refused to present anything further, and therefore no argument was presented in behalf of Mexico on the question of direct responsibility. Counsel for the United States contented himself with merely remarking with reference to this subject that it is well established that a government is responsible for the acts of its officials.

The Commission has in other cases extensively considered cognate questions relating to responsibility of a government for its officials, including such as are sometimes called "minor officials."

In the *Massey* case it was argued by counsel for Mexico that a minor official who had allowed a prisoner to walk out of jail had been apprehended and strong action had been taken against him, and that therefore no responsibility attached to the Mexican Government for his conduct. It was stated in the opinion written in that case that to attempt by some classification to make a distinction between "minor" officials and other kinds of officials must obviously at times involve practical difficulties. And it was said that in reaching conclusions in any given case with respect to responsibility for acts of public servants the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to the persons or property, or the nature of functions performed whenever a question is raised as to their proper discharge. It was pointed out that the conduct of officials had been such that there had been no proper arrest and prosecution of a person who had committed murder, and that therefore there had been a failure of observance of the general rule of inter-

national law with respect to the proper action looking to the punishment of a person who injures an alien.

It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility.

It appears from the record that the Alcalde of Aguacaliente de Baca exercised certain judicial functions. He is classified under the Code of Criminal Procedure of Sinaloa as a part of the "judicial police." Under international law a nation has responsibility for the conduct of judicial officers. However, there are certain other broad principles with respect to personal rights which appear applicable to the instant case. These principles are recognized by the laws of Mexico, the laws of the United States and under the laws of civilized countries generally, and also under international law. There must be some ground for depriving a person of his liberty. He is entitled to be informed of the charge against him if he is arrested on a warrant. Gross mistreatment in connection with arrest and imprisonment is not tolerated, and it has been condemned by international tribunals. It seems scarcely to be necessary to say that guarantees of this nature were violated when the Alcalde who, as it appears from the decision of the Sinaloa court, had authority to issue proper warrants, issued a void warrant as the court held, a warrant stating no charge, and directed the execution of that so-called warrant by armed men who killed a cultured and inoffensive man, who evidently had sought to avoid trouble with the Alcalde. For this tragic violation of personal rights secured by Mexican law and by international law, it is proper to award an indemnity in favor of the claimants. The sum of $8,000.00 may be awarded in the light of precedents which it is proper to consider in connection with the instant case.

Decision

The United Mexican States shall pay to the United States of America in behalf of William T. Way, individually, and as guardian of the person and estate of John M. Way, Jr., the sum of $8,000.00 (eight thousand dollars), without interest.

Done in Mexico, D. F., this 18th day of October, 1928.

KRISTIAN SINDBALLE,
Presiding Commissioner.
FRED K. NIELSEN,
Commissioner.
G. FERNÁNDEZ MACGREGOR,
Commissioner.

BOOK REVIEWS*

Wettbewerbsrecht unter besonderer Berücksichtigung des Namens—, Firmen—, Patent-und Warenzeichenschutzes. Kommentar. By Dr. Carl Becher. Berlin: Hermann Sack Verlag, 1928. pp. viii, 492. Index. *Rm.* 25.

This is an exhaustive commentary on the German law relating to unfair competition with particular reference to the protection of trade names, trademarks and patents. The author has added his notes and comments after he has given the text respectively of each section of the statute of June 7, 1909 (*Gesetz gegen den unlauteren Wettbewerb*). He has added illustrations of actual cases and has quoted extensively from the opinions of the appellate courts of Germany wherever the interpretation of the statute has been a matter of litigation. He believes that legislation regulating trade competition will become more detailed and he maintains that Art. 10*bis* of the Paris Convention of March 20, 1883, relating to industrial property, as revised by the Hague Convention of November 6, 1925, represents a beginning of *international* legislation in this field. He also points out that Art. 6*bis* of the convention has made the registration of trademarks subservient to the principles of unfair competition in international commerce. This article forbids a generally known trademark belonging to the subject of a foreign state, member of the union, to be registered in any other state, if such registration were to constitute an imitation or reproduction of a mark already used upon articles of the same kind. The German *Reichsgericht* has decided that the rights ordinarily secured by the law of trademarks must give way to the demands of the statute against unfair competition. The author approves this principle and believes that it lights the way for the establishment of a proper relationship between other fields of industrial property, including patent rights, and the rules of unfair competition.

The material of the book is taken, of course, predominantly from German sources, but the author's references to the effect of treaties upon local legislation makes the discussion interesting also to students of international legislation. The growth in the number and in the geographical scope of cartels operating internationally gives the entire question of the control of unfair competition a peculiar importance. The author touches only incidentally this larger subject as it is strictly not within the scope of the present work. The commentary is a useful introduction to the legislation of a country which has gone very far toward giving a legal status to principles of competition which still remain in most countries merely ethical concepts.

ARTHUR K. KUHN.

*The JOURNAL assumes no responsibility for the views expressed in book reviews or notes.—ED.

Die Immunität der Staatsschiffe. By Marius Böger. Verlag des Instituts für Internationales Recht an der Universität Kiel, 1928. pp. viii, 215. Rm. 7.50.

This book is by far the most substantial work on the subject of the immunity of state-owned vessels that has yet appeared. Its outstanding merit is its comprehensiveness. The author explains the doctrines of extraterritoriality and the exemption of foreign states from local jurisdiction, sketches a classification of various types of vessels, analyzes the judicial decisions of ten countries, gives a thorough commentary upon the Brussels Convention of April, 1926, and rounds out his study by an exhaustive bibliography. The practical usefulness of the work is marred by the lack of an index. The omission of certain specific cases is more than offset by the inclusion of several subjects uniformly ignored by previous writers.

By far the most serious criticism of the work attaches to its attempted legal analyses. In the section devoted to the United States alone, there are several glaring misconceptions. For instance, on page 105 it is said that the Suits in Admiralty Act permitted an action *in personam* against the United States only when the vessel giving rise to the action was "under lease to a private company." This is not in accord with Article 2 of the Act. On page 132 it is further stated that "the Shipping Board expressly renounced its right to immunity" by the diplomatic communication addressed to the various Foreign Offices early in 1923. The text as quoted is obviously merely an expression of intention not to claim immunity, under certain circumstances, when the occasion should arise. It is not in itself a renunciation. More important still, it is not even an expression of intention to waive exemption in suits *in personam.* That this is completely misunderstood, is evidenced by the fact that in discussing (page 100) the case of the Compañía Mercantil Argentina *v.* the U. S. S. B., in which proceedings were taken *in personam*, the author erroneously states that the action was *in rem* and so misses the whole point of the insistence of the United States upon its immunity in a case decided in 1924. In fact, it is obvious that the American conception of a suit *in rem* is not entirely clear to the author. There seems no other way to explain such a statement as that appearing on page 105: under the Shipping Act of 1916 "an *actio in rem* was permitted against the American state."

Other workers in this interesting but difficult field will be most grateful to Dr. Böger for his thoroughness in the assembling of material for this book; they should not feel, however, that the need for an intensive study of the various legal principles involved has been filled.

ELEANOR WYLLYS ALLEN.

The Law of Nations. By J. L. Brierly. New York: Oxford University Press, American Branch, 1928. pp. viii, 228. Index. $2.00.

This small volume furnishes a most readable and convenient statement of principles underlying the international law of peace. The author presents

his conception of the law as "neither a chimera nor a panacea, but just one institution among others . . . for the building up of a saner international order." He believes the law of nations differs from national law mainly because it is at an earlier stage of development than is the law of a well-ordered modern state.

While there is doubtless room for disagreement with the author on some points dealt with (*e. g.*, at pp. 84, 172, 177), the clearness and conciseness of statement on such matters as sanctions (p. 52), jurisdiction over foreign ships in port (pp. 113–118), and the mediatory functions of the League of Nations Council (p. 213), will be readily appreciated. Well selected cases and incidents are used in illustration, but the book is free from lengthy foot-note explanations. Throughout is evidenced the author's tendency to respect realities rather than theories; thus he insists that "the law in the interests of general international order must recognize facts" (p. 95), and believes that "the credit of international law has more to gain by the candid admission of breaches of it when they occur, than by attempting to throw a cloak of legality over them" (p. 160).

A final chapter, on International Organization, covers the development about as fully as could well be done in 25 pages, and concludes with a section on the functions of the League of Nations.

ROBERT R. WILSON.

Bismarck's Relations with England, 1871–1890. (German Diplomatic Documents, 1871–1914, in four volumes, Vol. I.) Selected and translated by E. T. S. Dugdale, with a preface by the Hon. James W. Gerard and an introduction by J. W. Headlam-Morley, C.B.E. New York and London: Harper and Bros., 1928. pp. xxviii, 399. General index and index of principal persons. $7.50.

An English translation of the documents from the German Foreign Office archives published in *Die Grosse Politik der Europäischen Kabinette* is, of course, certain of a welcome. It may also be conceded that an abridgment of that monumental work is a useful undertaking, as has lately been recognized by the German editors themselves in issuing an abridged edition of four volumes (*Die auswärtige Politik des Deutschen Reiches*, Berlin, 1928). There are obvious limitations, however, to the usefulness of an abridgment in which reference to Germany's relations with England is made the principle of selection, as is the case in this volume. Those relations are by no means always the most significant in Germany's diplomacy.

Moreover, since references to relations with England often occur in correspondence concerned mainly with other subjects, the English editor has been obliged either to include material not directly relevant or to lift documents and extracts out of their proper context. While occasionally he has chosen the former alternative, as in the negotiations for the formation of the Triple Alliance, he has generally preferred the latter. The result is a sometimes

deplorable mangling of texts, not greatly remedied by sporadic attempts to fill up the lacunae by bracketed summaries. It cannot be said that these summaries always conform to the introductory assurance that the editors have "confined themselves to a faithful reproduction from the original work." The statements made are often highly interpretative: *e.g.*, "Very soon after the Congress of Berlin Prince Bismarck was preparing to let Russia go . . ." (p. 126). One revives an ancient error of capital gravity, corrected in the German publication itself, in referring to "the signing of the Three Emperor Agreement at Skiernevise [*sic*] on September 17, 1884" (p. 130).

The translation, as checked in the case of certain outstanding documents, appears generally acceptable, though marked by a lack of precision in the rendering of some expressions and in the occasional omission of qualifying phrases. It is rather annoying to find *entgegenkommend* consistently translated *forthcoming*, using the English word in a sense characterized by all dictionaries as "rare." Such downright inaccuracies as have been caught in passing occur in the German notes and marginalia. In an editorial note *Anlass* is misleadingly rendered as *pretext* (p. 131). In one of Bismarck's brief marginal comments, *zugeben* is translated as *suggest*, and *andeuten* as *explain* (p. 326). His more colloquial expressions are sometimes left untranslated, but the rendering of *noch Manschetten hat* as *is still keeping in with* quite distorts the meaning of a significant remark (p. 255). Such slips do not inspire confidence in the trustworthiness of the work as a whole.

Nothing new can be said on the score of the content of documents so long since published in their original language and so thoroughly exploited by scholars of all nationalities. It may be profitably observed, however, with the later volumes in view, that in Bismarck's famous approaches to England for coöperation in foreign policy, he is shown to have limited his suggestions for direct engagements between England and Germany to the case of common defense against France, directing the other country to find security for its Eastern interests in association directly with Germany's allies, Austria and Italy.

J. V. FULLER.

Die Grundsätze des Versailler Vertrags über die Liquidation und Beschlagnahme deutschen Privatvermögens in Auslande. By Dr. Richard Fuchs. Berlin: Carl Heymann, 1927. pp. 326.

This book constitutes a part of the sixth volume of the well-known Leske-Loewenfeld collection entitled *Rechtsverfolgung im internationalen Verkehr.* The series began in 1895, and embraces works of distinct value. In it are included three volumes of comparative study of the procedure for the enforcement of rights, and of much of the private law of the principal countries of the world at the end of the nineteenth century, and a volume on the marriage laws of European states.

Since the War the editors have devoted attention to the field of public law. The fifth volume comprises a collection of the noteworthy decisions of the Mixed Arbitral Tribunals which have been sitting under the Treaty of Versailles and similar treaties to adjust the problems arising out of the enforcement of Articles 296 and 297 and following of the Treaty of Versailles and similar articles in the other peace treaties. The work under review is one of the most important in the collection. It contains an exhaustive analysis of the provisions of the Treaty of Versailles, of the decisions of the Mixed Arbitral Tribunals, of local legislation in the Allied countries with respect to the sequestration, liquidation, and confiscation of the private property of citizens of Germany, Austria, Hungary, and Bulgaria, and of the provisions of legislation in Germany for the partial reimbursement of its expropriated nationals. The author is one of the high officials of the Finance Ministry of Berlin. The present work stamps him as a scholar. He has examined in great detail the operation in practice of Articles 296 and 297 and following of the Treaty of Versailles which provided for the Clearing Offices and for the liquidation of enemy property, respectively. His analysis is illuminated by critical references to the decisions of the Mixed Arbitral Tribunals and the opinions of commentators. The discussion of the decisions is often enriched by an examination of theory and doctrine. The criticism of the celebrated decision of the Franco-German Mixed Arbitral Tribunal in the case of *Société Vinicole de Champagne* v. *Mumm* (Rec. I, 496), in which it was held that the liquidation of the Mumm plant in France carried with it the confiscation of Mumm trade marks in every country of the world—a decision which has been generally condemned—is restrained, yet penetrating (p. 130).

The technical rules which have grown up in connection with the enterprise of confiscating and disposing of billions of dollars' worth of private property of every conceivable character, of adjusting debts and claims through Clearing Offices, and of endeavoring to maintain a semblance of order in property relations, are necessarily extremely complicated. The conflicting views often adopted by different Mixed Arbitral Tribunals evidence the uncertainty of the courts and the difficulty of the problems created by so unprecedented an interference of governments with rights of private property. To systematize this vast amount of material must have been an exceptionally onerous burden, but the author seems to have accomplished it, while maintaining a keen appreciation of the most difficult of the legal problems involved, particularly with respect to nationality, corporate nationality, the situs and character of property tangible and intangible, the concept of "cash assets" and innumerable other concepts which the treaties and their interpretation by the Mixed Arbitral Tribunals, by municipal courts, and by national legislation and administrative rules of custodians of enemy property have brought in their train. Throughout, the author adheres strictly to the legal analysis without political comment. He leaves

to others the estimation of the effects of so widespread a confiscation of private property on the future of foreign investments and of international relations. As a critical exposition of Articles 296 and 297 and related provisions of the Treaty of Versailles, the author has produced what is believed to be the most satisfactory and valuable book yet published on the subject.

EDWIN M. BORCHARD.

Les Principes et la Pratique des Services Consulaires. By Baron Alphonse de Heyking. Paris: Librairie Arthur Rousseau, 1928. pp. iv, 213. Fr. 30.

A course of lectures given at the University of Geneva in 1927–1928 has been published in book form under this title. Baron Heyking has drawn upon his long experience as the Russian Consul-General in London and elsewhere under the old régime to give a view of the consular service from many angles. After a brief history of the consular function, he describes the relationship which exists and also that which he believes ought to exist between the diplomatic and the consular services. He approves the opinion of Count Bernsdorf, expressed since the war, that the growth in the importance of economic questions in international politics has definitely put an end to the traditional separation of the two services. Paleologue, in his well-known memoirs of the last days of the Czarist régime, misconceived the causes of the final collapse, according to our author, for the very reason that he was not in touch with any but the court classes nor with information which could have been supplied by the French consular service.

Baron Heyking presents an outline not only of the duties of consuls, but also of the personal and moral qualities which should be developed by consuls of career. He indicates to what extent an efficient consular officer may be of service to his country and his countrymen, as well as an instrument for the promotion of good international relations in general. He warns against undertaking to do either too much or too little and gives many examples of actual problems drawn from his own rich experience. He treats of extraterritoriality in its most recent aspects, and remarks that the recognition of Soviet Russia *de jure* by certain Powers without any demand for extraterritorial jurisdiction is a justification for demanding its abolition in China, being a country which offers the greater security to foreigners (pp. 175–176).

Enough has been said to indicate that this is not a dry manual on the consular service. It is both interesting and practical and may be read profitably in all countries in which consular reform is part of the legislative program.

ARTHUR K. KUHN.

Our Relations to the Nations of the Western Hemisphere. By Charles Evans Hughes. Princeton: Princeton University Press, 1928. pp. vi, 124. Index. $1.75.

These are the Stafford Little Lectures delivered at Princeton University in 1928. They are three in number, the first devoted to an exposition of the

Monroe Doctrine and to our relations with Canada, the second dealing with our recognition policy in America and the international aspects of loans and investments, the last discussing political intervention in backward states, the pacific settlement of controversies between American states, and the prospects of international organization. Together they constitute, within the small space of 119 pages, a valuable and authoritative commentary upon our political policies in the New World, by the most distinguished of our recent Secretaries of State.

The main theme of the volume becomes inevitably our relations with Latin America, and especially with the weaker states of Latin America; fifteen pages only are devoted to Canada, in particular to the International Joint Commission established by the treaty of 1909. In his discussion of the Monroe Doctrine, Mr. Hughes repeats substantially the ideas contained in his notable address before the American Academy of Political and Social Science at Philadelphia in November, 1923. But what he said on that anniversary occasion well bears repetition; for the difficulty, he reminds us, "has been not in our defining the Doctrine, but in our failing at times to define it, in the indulgence in indefinite pronouncements, in making it a cover for extravagant utterances and pretensions which are foreign to the purposes of our Government, the demands of our security, and the sentiment of our people."

In the matter of our recognition policy, Mr. Hughes is more difficult to follow. Certainly we have moved far from the policy, formulated in statements quoted by him from Jefferson, Buchanan, Seward, Hay, and Hill, of always recognizing *de facto* governments. It is true that Central America constitutes a special case. We are morally, if not legally, bound to make our policy there conform to the treaties of 1923. But our refusal, for more than three years, to extend recognition to a stable government of revolutionary origin in Ecuador suggests that we are applying our Central American policy to other American nations as well. Mr. Hughes takes pains to point out, however, that this policy "does not involve, and should not be a pretext for, an interference in their internal affairs."

About foreign loans and investments, and about intervention, whether political or for the protection of lives and property, Mr. Hughes has much to say that should be earnestly pondered by our critics in both South and North America. An examination of the merits of our recent intervention in Nicaragua he skilfully avoids, although a veiled criticism may here and there be detected in his words. Of the success of any plan of compulsory conciliation in this hemisphere he is very doubtful, and anything like an American league of nations at present he believes undesired and unnecessary.

This little volume is a work of distinction both in form and in content. Nothing less was to be expected from the pen of Charles E. Hughes; but the Princeton Press has collaborated to produce a very agreeable piece of bookmaking.

C. H. HARING.

The Washington Conference and After. By Yamato Ichihashi. Stanford University Press, 1928. pp. xii, 443. Index. $4.00.

This well-written and interesting book by an unusually competent Japanese participant in the negotiations, presumably offers a view which Japan would like Americans to accept. We have a detailed account of the course of the negotiations at the Washington Conference, based on the official minutes and some account of the preliminary steps leading to the conference. But the book is far from being a "complete" account, as is claimed for it on its cover sheet. It has little or nothing to say of the conflicts of great political and economic national policies which made the conference seem desirable to the participants. By such omission, the general inpression conveyed by the book, without any direct statement, is that whatever happens in regard to international affairs in the Far East, the outcome, whatever it may be, need give this country no serious concern. As examples of effective omissions: in Chapter XVI as to "electrical installations," no one would guess that the real point at issue was what nation, if any, was to control foreign propaganda to the Chinese public through foreign control of radio and telegraph. In the treaty on the Open Door (p. 198), who would suspect that Article V was designed to prevent future gross discriminations against American business through control of foreign railway facilities, in which Japan had not been the least offender? As for the desire of the Chinese to control their own mails (p. 207), they alleged that Japanese postal facilities were used to pass opium illegally through the Chinese customs. Such charges are carefully avoided in the records, although they guided the course of negotiations.

As for the Naval Treaty, which is the best known to Americans, the writer makes only a veiled allusion (p. 9) to the English propaganda in this country which was largely responsible for the conference. The English desire for us to reduce our naval armament antedated that of this country, and in describing the preliminary negotiations in London the writer makes no reference to the Premier's declaration in the early summer of 1921 that political differences must be settled before reduction of armaments could wisely be made. Thus Lloyd-George provided that the Canadian demand for the abolition of the Anglo-Japanese alliance might be taken up at Washington as a seeming concession to this country in return for the destruction of our ships which threatened British control of the seas. The rejection of the American proposal as to cruiser limitation the author lays to the French, although he admits (p. 70) that it was the British stand also. The writer does not point out that the American proposal reserved nothing for negotiation, and therefore if this country was not to reject her own proposal, she had to accept every modification of it that other Powers insisted on. Thus, as Japan's price for signing the treaties she inserted the *status quo* clause as to fortifications in the ship treaty, whereby she entirely altered the value of the 5-5-3 ratio as offered by the United States and so put herself in a position to carry out her

policies in Eastern Asia with comparatively little fear of effective interference, either by this country or by England.

The book is valuable for the details it gives, but readers should not rely on it for basic information.

W. L. RODGERS.

The Development of Extraterritoriality in China. By G. W. Keeton. New York: Longmans, Green and Co., 1928. 2 vols. pp. xvi, 405; viii, 422. Index. $15.

Mr. Keeton's aim, as stated in his preface, has been "to present an explanation of extraterritoriality—to show the difficulties in early European intercourse . . . ; to demonstrate why it was impossible to admit the Chinese claim to jurisdiction over foreigners; and then to describe the system which was erected upon the inadequate foundation of the treaties and to show how it operates in practice."

After an introductory chapter on early western intercourse with China, come three chapters dealing with conflicts of jurisdiction, obstacles to the recognition of Chinese jurisdiction, and the conclusion of the first extraterritorial treaties. The second half of volume one treats of: The Supreme Court of Hongkong and British Consular Jurisdiction in China, 1833–65; Attacks on Foreigners and their Punishment, 1842–56; Extension of the Principle of Extraterritoriality in China, 1856–1918; and Mixed Courts in China. Chapters IX–XI, which comprise the first 172 pages of volume two, discuss The Chinese Legal Reform Movement and Modern Chinese Law; The Nature and Extent of Extraterritorial Jurisdiction in China; and Extraterritoriality in General Historically Considered. The remainder of volume two is given up to illustrative documents, bibliography, and index.

In tracing the causes and development of extraterritorial jurisdiction by foreign governments over their nationals in China, Mr. Keeton has done an excellent piece of work: much more satisfactory, in the opinion of the reviewer than Morant's *Exterritorialité et Intérêts Étrangers en Chine* (Paris, 1925), with which it will most naturally be compared. Not the least valuable feature is the very full discussion of the findings and recommendations published in the *Report of the Extraterritoriality Commission* (1926).

When the author turns from factual history, however, and endeavors to prove that extraterritoriality rests upon some general principle of international law other than force, it is difficult to accept his reasoning. We may grant that, "from the western point of view at least, in countries where the legal system is backward and inapplicable to the foreigner, then the foreigner is not subject to territorial jurisdiction, and jurisdiction is therefore not one of the inherent rights of sovereignty." A Chinese author would state, more briefly, "From the western point of view, Might is Right." It is not so easy, however, to concede the truth of the statement with which Mr. Keeton continues: "This was the case with China at the beginning of the

nineteenth century, and the proposition is further proved by the fact that several European nations claimed and exercised extraterritorial rights at Canton long before treaty days." (I, 218–9) Mr. Keeton's repeated assertion that extraterritoriality preceded the treaties, in which he agrees with Morant, not only conflicts with American theory as stated in Moore, *Digest*, II, 596; it is also contradicted by several of his own citations from the opinions of British authorities at the time, *e.g.* (I, 71) the case of R. *v.* Depardo in 1807; (I, 54) the Court of Directors of the East India Co. to the Select Committee at Canton in 1812; and especially (I, 174) Lord Aberdeen's instructions to Sir Henry Pottinger, January 4, 1843.

Taken as a whole, Mr. Keeton's work is painstaking, thorough, and authoritative. No matter what may be the outcome of the present campaign of the Chinese Nationalists for the abolition of extraterritoriality, these two volumes will be of permanent value to all who study the history of China's relations with the outside world.

G. NYE STEIGER.

Deutsche Handelsflotte und Versailler Vertrag. By Paul Kollbach. Berlin: Ferd. Dümmlers Verlag, 1929. pp. 176. Mk. 9.50.

This study, dedicated to Dr. Stressemann, with a foreword by Dr. Curtius, is more than its title indicates. It is the tragic story of the rise and fall of the German merchant fleet, though its rise is very briefly summarized and the depressing account of its almost complete destruction is somewhat relieved by a final account of its rapid recovery. The bulk of the work covers the years from 1914 to 1929 and is devoted to an analysis and discussion of the agreements forced upon Germany by the victors, which resulted in the loss of the greater part of its fleet. This carries the reader through the conferences at Campiègne, Trier, Spa, Brussels, Versailles, London, Paris and Washington. He also includes an account of the difficulties that the shipping companies had in meeting the requests of the German Government in its attempt to comply with the demands imposed by the Treaty of Versailles; but, in the opinion of the author, the greatest blow was dealt by America in its seizures and "sequestrations" and in the dilatory action of our government in the matter of restoration and compensation after having, in effect, acknowledged the justice of the German claims, claims that have not yet been fully adjusted. This study represents a great amount of careful and painstaking labor; it is loaded with facts, tables and statistics and fortified with numerous footnotes and references. It is one of the series edited by Professors Pohl and Wenzel under the general title: *Völkerrechtsfragen* (Problems in International Law); and as many of the problems considered allege a violation of the rules of law, it has a distinct value, aside from its main theme, for those interested in the rights of public and private property during and after the World War.

KARL F. GEISER.

The Pact of Paris—A Study of the Briand-Kellogg Treaty. By David Hunter Miller. New York: G. P. Putnam's Sons, 1928. pp. vii, 287. Index. $3.00.

This volume gives a history of the negotiations leading up to the conclusion of the Briand-Kellogg Pact in August, 1928, and expresses the author's views as to the meaning and significance of the treaty in world affairs. The second half of the book reprints the documents which are analyzed in the first half.

Mr. Miller examines each note which passed between the United States and France from the Briand note of April 6, 1927, and the draft of the Treaty of Perpetual Friendship offered by M. Briand in June, 1927, down to the final replies of the fourteen Powers to the second Kellogg draft of June 23, 1928. While ably tracing the evolution of the negotiations, Mr. Miller does not adequately point out that the final result was something quite different from what M. Briand first conceived. A sentimental agreement between two Powers to renounce war as an instrument of their national policy towards each other, an avowal probably to be found in every treaty of peace and friendship between nations, became a multilateral treaty to renounce war "as an instrument of national policy," subject to numerous exceptions and qualifications. The French effort to mold the original Kellogg suggestion of a multilateral treaty into a universal agreement to outlaw only "aggressive" war, though rejected in terms, would appear to have succeeded, for the exceptions of wars of "self-defense," wars under the Locarno treaties, under the Covenant of the League, under the French treaties of "neutrality," whatever those may be, would seem to exclude, if they exclude anything, only aggressive wars. As the author says (p. 120): "It is to be added also that in the result the other governments, particularly the French and the British, got everything they deemed essential." On the occasion of the signature of the treaty, M. Briand considered that it was "a kind of general reinsurance" for the League of Nations and that its essential feature was to renounce war "in its most specific and dreaded form—selfish and willful war."

Mr. Miller finds, correctly we think, that the United States is now tied to the apparatus of the League of Nations to preserve peace, which by many countries is interpreted as the preservation of the *status quo*. Mr. Miller says (p. 129): "One ought not to pay too much attention here to the emanations from Washington to the effect that the Treaty does not in any way tie the United States up to Europe or to European controversies or to the League." Secretary Kellogg is quoted as the source of the "emanations." Mr. Miller maintains that, in view of the general signature of the Pact, a breach of the Covenant would be a breach of the Pact, and that the United States could not refuse to aid the League to enforce both Covenant and Pact. The author finds the real value of the treaty in Article 2, the agreement to settle all disputes or conflicts "by pacific means." He may be right.

But if, as the author says, correctly it is believed, that the interpretations, exceptions, and qualifications found in the exchange of notes constitute an inherent part of the obligations assumed or not assumed under the treaty, because, as he says, the treaty means what the parties say it means, are not these exceptions which reserve the privilege of making war under given but mainly unstated circumstances an exception to Article 2 also? Or are they to be deemed an exception only to Article 1, the renunciation article? Many wars have occurred, indeed the most widespread, not "for the solution of international controversies," but, without proof of any specific controversy, because of treaties of alliance, because of unexpressed conflicts of interest, and, indeed, possibly from spontaneous combustion when the political atmosphere became surcharged. Nor has any nation ever professed to adopt war "as an instrument of national policy."

The author, correctly it is believed, regards the United States as having impliedly accepted the British Regional Doctrine, which contains a wide reservation of the privilege to make war in unspecified areas whenever British vital interests are deemed to be attacked. The author assumes these regions to cover Egypt, the Suez Canal, and the Persian Gulf. Other writers have thought that they covered Afghanistan, Gibraltar, and the Far East. The British Government, however, which is the judge, has placed no limitations on the areas involved. Egypt, Persia, and Turkey objected to the British reservation, as did Soviet Russia; the matter may some day become practical. In so far as force may be used in support of the Monroe Doctrine, it will now be employed not as an instrument of national policy, but as a matter of "self-defense."

In his analysis of the treaty, the author does not point out what are the "benefits" to be "denied" to the violator of the treaty. Nor does he point out what are the French treaties of alliance or neutrality, whose obligations remain in force notwithstanding the Anti-War Pact. Senator Borah is not given any credit for the formulation of American policy in the exchange of notes. The volume appeared before the debates in the Senate, so that the author has had no opportunity to express his opinion on the effect of the report of the Committee on Foreign Relations, which, as an uncommunicated document, the reviewer regards as not in any way binding upon foreign governments. The author refers to the "application of the economic blockade of Article 16 of the Covenant, primarily such an application by the British *fleet*" (p. 133), although these two measures are diametrically opposed. The United States has never refused to respect a legal blockade; the measure under Article 16 is a "pacific" boycott, intended not to be war, though the author believes that the United States is now bound "under the Treaty" to respect such a boycott imposed by the League, and is morally bound to join in it. Indeed, he regards neutrality "following the Covenant" as "ended," for which he has distinguished, if not convincing, authority. He reiterates that "the Treaty links the United States to the

League of Nations as a guardian of peace" (p. 132), but thinks that, with the end of neutrality, the treaty has put an end to the "difficulties about Sea Law," that "success in the efforts toward general disarmament cannot fail to be attained," and that, "by a different road from that envisaged in 1924, the world has moved on toward the ideals of the Covenant and of the Protocol of Geneva: arbitration, security, and disarmament."

The author has made a useful analysis of the negotiations and deals with the documents in a lawyer-like way. If he indulges hopes and prophecies which some students will find it a little hard to support, he nevertheless does indicate what the advocates of the League of Nations expect from the Anti-War Pact. Should the United States some day disappoint these hopes and prophecies, it will invite misunderstanding and recriminations. The essence of the treaty, unless Article 2 be read alone, is not, it is believed, in its terms, but in its implications. The European signatories, it is believed, have given up nothing; the United States, it is thought in Europe, has given up much. *How* much is a matter of opinion, whether one regards the commitments as desirable or not. One distinguished proponent of the treaty has minimized its legal importance, but has emphasized its function as a means by which the people could compel their own governments to prevent a plunge into war. That could hardly have been the conception of the framers. If Article 2 is the essence of the treaty, however, no government that takes the treaty seriously should refuse to subscribe to Article 36 of the Statute of the Permanent Court of International Justice providing for the obligatory submission of legal questions. That would be a tangible and practical step in the direction the author contemplates.

EDWIN M. BORCHARD.

Far Eastern International Relations. By Hosea Ballou Morse and Harley Farnsworth MacNair. Shanghai: The Commercial Press, Ltd., 1928. pp. xx, 1128. Index. $10.00 (Mex).

Until recently teachers of courses in the politics and foreign relations of eastern Asia have been handicapped for want of at once concise and circumspect books which might be placed in the hands of college students for use as textbooks. Materials in foreign languages, including English, pertaining to this field are plentiful. They include hundreds of special studies of particular periods or episodes and as many general works of but incidental import to the scholar. To these have been added recently several works, general in scope, but sufficiently detailed to be of service as textbooks for college use. But among the works having particular bearing on China there has been none more essential for constant reference than the monumental and highly accurate work of Dr. Morse, formerly Secretary to the Inspector-General of the Imperial Maritime Customs of China, his *The International Relations of the Chinese Empire* (1834–1911) in three volumes. What Sir Henry Yule's *Cathay and the Way Thither* (H. Cordier's revision in four volumes) is to the

study of China's ancient, medieval and Mongol period contacts with the West, Dr. Morse's compilation is to the study of China's modern relations with Japan and the West. This latter work, in spite of its voluminous character, and its several chapters and explanatory footnotes which treat of subjects in part only of technical interest to the specialist, will remain the indispensable reference work for students of China's modern foreign relations to the revolution.

The task undertaken by Dr. MacNair is a condensation into one of Dr. Morse's three volumes which remain "the heart of this study." Incidental to condensation has been occasional revision in interpretation; introductory chapters have been added; some new materials have been inserted in the body of the work (as on Siam and Malaya in Chapter 18) and those on the opening of and internal politics of Japan. From Chapter 24, seven chapters which are either not contained in Dr. Morse's work, or detailed expansions of them, bring the account of *Far Eastern International Relations* down to date.

Sacrifice of detail, some of it essential to the specialist, as in the treatment in Morse of the origin of foreign control of the Chinese maritime customs administration, and concerning the postal system, was, of course, necessary if the principal purpose of the condensation was to be served. The result is a single volume, in its present form in a binding too frail for its weight, which can have far more practical utility as a textbook in ordinary courses on Far Eastern international relations than the original work of Dr. Morse. As a companion volume to Dr. MacNair's *Modern Chinese History: Selected Readings* it will be found serviceable as a principal textbook for college use.

The scholarship, speaking generally, of the first 23 chapters (with exceptions noted) is primarily that of Dr. Morse, to which the editing ability of Dr. MacNair has been applied to good effect. The chapters which follow are composed of materials contributed by Dr. MacNair himself. Of these, the chapters on Soviet Russia and the Far East and The Far East in 1927 are especially valuable, containing, as they do, new materials, new in that the events considered are of so recent occurrence as to have been treated only in a sketchy manner in current general texts or adequately only in sources difficult of access. Chinese language sources, difficult of access and still more difficult to use, have not been utilized, nor have Japanese. In fact, this is not to be wondered at, especially as Chinese and Japanese scholars writing in this field, with a few noteworthy exceptions, place principal reliance on foreign, and especially English language, sources themselves.

Dr. MacNair's concluding chapter is conspicuously objective and accurate in its treatment of highly controversial subjects, as, for example, "The May Thirtieth Incident" of 1925 and Soviet Russian influence in Kuomintang circles during the period which followed until the summer of 1927. Though he declares that "no impartial student could admit" that Mr. Strawn's assumptions with reference to the real and major cause of China's political,

social and economic ills are "wholly correct," he presents no evidence that the American representative on the Tariff Conference in Peking and member of the Commission on Extraterritoriality was unmindful of the abuses which have grown out of extraterritoriality in China. From the materials presented by Dr. MacNair it would seem that, on the contrary, they are strikingly in general agreement.

C. WALTER YOUNG.

International Law. By L. Oppenheim. Vol. I. Peace. 4th ed. Edited by Arnold D. McNair. London: Longmans, Green & Co., 1928. pp. L, 827. Index. $15.

Students and teachers of international law, particularly those of the English-speaking world, owe a great debt of gratitude to L. Oppenheim, formerly Whewell Professor of International Law in the University of Cambridge, England, for his remarkable treatise on international law published in 1905–1906 in two volumes.[1] A second and revised edition of this work was published in 1912.[2] After Oppenheim's death on October 7, 1919, a new edition having been called for, Ronald F. Roxburgh, barrister-at-law, was selected for the difficult task. This task was on the whole well performed in the third edition that appeared in 1920–21. But probably owing to the condition of Oppenheim's manuscript, Mr. Roxburgh failed to distinguish clearly between his own contributions and those of the late Professor Oppenheim. In 1926 there appeared a fourth edition of Oppenheim's second volume entitled *Disputes, War and Neutrality*, edited by Arnold D. McNair. In his review of this volume,[3] Professor George Grafton Wilson remarked upon the difficulty of distinguishing between Oppenheim's own views and those of his editors, and raised the question "whether in the editing of books on international law which have already become well-known, new or changed material should not be indicated by the initial of the editor, by brackets or some similar device, in order that the reader may easily identify its source."

In his preface to the second volume of the fourth edition published in 1926, Dr. McNair says: "I must warn the reader that if on any point he wants the author's *ipissima verba* he must refer to the second edition, and then examine the third edition in the light of Mr. Roxburgh's prefaces," and also that "a considerable amount of the text of the third edition has been put into footnotes or into smaller type." In the review referred to above, Professor Wilson adds: "Sometimes parts of the text itself have been changed or omitted altogether. This can only be discovered by comparing editions page by page. If this mode of editing is to continue and a fifth edition should

[1] For a review of this edition, see this JOURNAL, Vol. II, pp. 240–44.
[2] Reviewed in this JOURNAL, Vol. VI, pp. 1054–55, and Vol. VII, pp. 439–41.
[3] See this JOURNAL, Vol. XXI, pp. 397–98.

be issued by still another editor, the original point of view of Oppenheim, which a reader might wish to know, would require considerable research to discover."

These warnings and this criticism also apply to the present volume. In order to learn what changes have been made in this edition, it is necessary to refer to the Preface. The most important of these are perhaps those made relative to Recognition of States and Governments, the Self-Governing Dominions, Mandated Areas, the League of Nations, etc. But it would be very difficult to learn Oppenheim's views on these matters as distinct from those of his editors.

Having started on the wrong path (which, however, it may have been impossible to avoid), it is probably impossible for future editors to retrace their steps. However, we may nevertheless be grateful that such able and erudite editors as Roxburgh and McNair have been found to carry out and develop Oppenheim's plans, purposes and ideas. His masterly classification and systematic treatment of the subject remains intact, and the immensely valuable bibliographies have even been enlarged and brought up to date—a task and service by no means slight or unimportant.

A. S. HERSHEY.

Economic Nationalism of the Danubian States. By Leo Pasvolsky. New York: The Macmillan Co., 1928. pp. xxvi, 609. Index. $3.00.

By reason of their inclusion in the free trade area of Austria-Hungary, most of the diverse nationalities in the basin of the Danube were, prior to 1914, bound together in an economic unit. Following the disruption of the war, Austria, Hungary, and Czechoslovakia came forth separately from the ruins of the dual monarchy, while Rumania and Yugoslavia received large additions of territory from it. These states have sliced into segments the economic organism which existed under the Hapsburgs, and they have consequently gone through some painful years of attempted reconstruction. Should they unite, should they coöperate without actual union, or should they maintain their aloofness? This is the riddle of the Danube as presented by Leo Pasvolsky.

The book is an excellent example of clear-cut exposition. The abundant data are systematically set forth in extremely usable form. The author introduces the subject with the emergence of the five abovementioned countries from the pre-war situation. He then takes up the problems of each of them in turn under the main headings of Currency and Fiscal Problems; International Accounts; Trade, Production, and Banking; and Economic Policy. He ends the book with a discussion of the possibilities of political and economic combination, and concludes that unity is not probable. The Danubian problem, he believes, is not adapted to a regional solution. The future of each of the countries depends rather upon the development of

Europe as a whole. The study reflects much credit upon the author and likewise upon the Institute of Economics and the Brookings Institution, under whose auspices it was conducted.

BENJAMIN H. WILLIAMS.

International Law as Applied to Foreign States. By Julius I. Puente. Chicago: Burdette J. Smith & Co., 1928. pp. xxiv, 299. Index. $5.00.

In this book, intended as a companion volume to *The Foreign Consul*, by the same author, an attempt has been made to state the rules of international law on certain topics, as found in American court decisions and expressions of official opinion in the United States. Following an introductory chapter dealing with international law in general and its relation to American municipal law, separate chapters cover Recognition, Suability of Foreign States, Ambassadors and Public Ministers, and Treaties. To the last-mentioned subject is given nearly half of the entire volume.

Historical analysis has been avoided, "as unnecessary," the author explains, "in view of the great number of excellent treatises now available." In few instances are text-writers cited. English cases have been relied upon, when American decisions were lacking. The result is a strictly legalistic treatment, based upon Anglo-American interpretations. This perhaps explains the rather brief mention accorded such important matters as the status of insurgents (p. 36), and the condition *rebus sic stantibus* in treaties (p. 264). The method followed did not require mention of divergences between Anglo-American and Continental European interpretations. On the other hand, the self-imposed restrictions have enabled the author to deal with certain practical questions (such as diplomatic immunities and private rights in territory ceded by treaty) "with the minute distinctions which legal precision requires" but which are frequently lacking in the treatises. With its wealth of citations of American decisions, the volume constitutes a valuable handbook, the usefulness of which is increased by its 24-page index.

ROBERT R. WILSON.

The Doctrine of Necessity in International Law. By Burleigh Cushing Rodick. New York: Columbia University Press, 1928. pp. x, 195. Index. $4.00.

The treatment of military necessity occupies the major part of the book. Mr. Rodick shows to what extent military necessity may go and attempts to show what restraints exist. Military necessity will excuse the action of the commander in firing upon the bearer of a flag of truce who, after being warned, persists in advancing. All means of transportation and communication within enemy territory may be destroyed on the ground that they are vital instruments of warfare. The burning of Atlanta by Sherman comes within the scope of military necessity, inasmuch as he could not spare troops

to hold the town and he could not afford to leave it standing in the rear to be seized by the enemy. Military necessity may excuse the seizure of supplies without the use of requisitions, as was done by Sherman in Georgia and the Carolinas on the grounds stated by him that "the country was sparsely settled with no magistrates or civil authorities who could respond to requisitions . . . so that this system of foraging was indispensable to our success." Examples of restraint upon the exercise of military necessity are lacking. The effect of reprisal is discussed and also the fear of having to pay reparations at the close of the war. The author agrees with Hall that we should not indulge in the delusion that formulas are stronger than passions. As between belligerents, demands for reparations cannot be made against the victors, and the vanquished will make every effort to evade payment. The additional restraint which he finds in connection with naval warfare is that exercised by the prize court in applying international law rather than municipal law, as shown in the case of the *Zamora*.

The invasion of Salonika by the Allies in October of 1915 and of Shantung by the Japanese and British troops in September of 1914, Mr. Rodick points out, could hardly come within the scope of military necessity. He finds that these invasions came as a result of reprisals aimed by both belligerents against each other in such a way as to involve a series of unlawful attacks upon the neutrality of Greece and China.

In the chapter on non-amicable modes of redress short of war, Mr. Rodick mentions the *Caroline* affair and rests largely upon the opinion of Westlake for his conclusion. He mentions also the Florida invasion by General Jackson and rests for his conclusion on W. E. Hall. The treatment would have carried greater conviction had he analyzed the diplomatic correspondence in both instances and, in the former case at least, have mentioned the oft-quoted statement by Webster which was accepted by the British Government—"It will be for that government to show a necessity of self-defense instant, overwhelming, leaving no choice of means, and no moment for deliberation." John Quincy Adams as Secretary of State at the time when Jackson made his inroads, represented that Jackson had taken action "not in a spirit of hostility to Spain but as a necessary measure of self-defense; and stated further: "The resort to force is justifiable only when justice cannot be obtained by negotiation; and the resort to force is limited to the attainment of justice. The wrong received marks the boundaries of the right to be obtained."

Mr. Rodick's treatment is supplemented with notes and a comprehensive bibliography.

CHARLES E. HILL.

American Policy Toward Russia Since 1917. By Frederick Lewis Schuman. New York: International Publishers, 1928. pp. 399. Index. $3.75.

A thoroughly documented study, marked by comprehensive scholarship and unflinching in the narration of facts, is that of Dr. Schuman on American

policy toward Russia since the revolution. The author had made use of all official and non-official materials in the English language, and one may presume that Russian sources, when made available, would in no essential respects change the broad conclusions of the subject. He traces the change in the traditional friendship between the two countries after the new turn taken by the revolution and the entrance of the United States into the war. Dr. Schuman holds the Allies responsible for the defection of Russia because of their failure to state the fundamental objectives of the war, though even then President Wilson remained sympathetic with the rights of the revolution and its new institutions. The encouragement given by Ambassador Francis to the occupation of the Trans-Siberian Railway by the Czech forces was in effect the entering wedge of intervention, which, designedly or otherwise, resulted in supporting all anti-Soviet forces by the Allies. A second disturbing factor in our relations with Russia was the flood of anti-Soviet propaganda in this country, a compound of ignorance, fear, and open calumny. The author points out that just as the worn-out Wilson, confused and embittered by opposition to his real peace aims, became the supporter of the Versailles measures against Germany, he also became the opponent of Russian recognition by the United States, even after other governments were surrendering the formula of keeping Russia outside the pale of humanity. Now, as then, the two essential grounds of non-recognition are the question of unconditional recognition of past debts and the restoration of the confiscated property of American citizens. The Russian counter-claims are ignored. Since 1923 Russia stood fully prepared to meet the principle of the United States, on the assumption that reciprocity would be recognized all around, but the suggestion only called forth the sharp rebuff from Secretary Hughes that no negotiations were necessary to meet the American principle. Our position, Dr. Schuman holds, is open to serious question as judged by both legal and political considerations. On legalistic grounds the argument of repudiation is weakened by the repeated offers of the Soviet State to open negotiations and by the refusal of the United States to concede the validity of the equally legitimate Soviet counter-claims. While it is true that on grounds of law the United States has the right to withold recognition of any government whose internal administration it believes to be contrary to the established order, the principle of recognition is a matter of policy and not chiefly one of legality. Our Department of State has not stated our reasons for political non-recognition as clearly as the legal arguments. Our policy has obviously been predicated upon the proposition that communism and capitalism are mutually exclusive systems, that Sovietism is a menace which should be suppressed, and that the revolution was the work of a few leaders without whom Russia would have been safe for democracy.

EUGENE M. KAYDEN.

Double Taxation and International Fiscal Coöperation. By Prof. Edwin R. A. Seligman. New York: The Macmillan Co., 1928. pp. x, 203. Index.

An excellent introduction to measures proposed to eliminate double taxation on income or property situated in one country but belonging to a person or company resident in another is contained in this book. After surveying the development of tax systems and legislation or treaties adopted to preclude double taxation, the author observes that it became a serious international problem only when the cumulation of very high rates after the World War restricted commerce.

In 1920, the League of Nations and the International Chamber of Commerce undertook to study double taxation, and the League appointed Professor Seligman and three other prominent economists to report on its economic consequences. With this report as a foundation, a committee of technical experts, named by the League, examined the practical phases of the question, and after a series of meetings prepared four model bilateral conventions, London, April, 1927. One dealt with the prevention of double taxation in the field of direct taxes on income and property, the second with inheritance taxes, and two others with administrative and judicial assistance in the assessment and collection of taxes. The experts also proposed the organization of a permanent committee under the League to study incidental questions.

To facilitate the conclusion of agreements, Professor Seligman proposes a classification of taxes which, in contrast to that of "personal" and "impersonal" taxes followed in the first-mentioned London convention, embraces (1) "personal taxes," (2) "semi-personal taxes," which are subdivided into "demi-personal" or situs and source taxes and "quasi-personal" or origin taxes, and (3) "impersonal taxes." These categories are then analyzed in the light of the benefit or ability theories of taxation. The essence of the problem is to obviate the conflict between tax jurisdictions by electing between the principle of situs or origin and that of residence. This is to be determined primarily by applying the test of economic allegiance.

Although it does not cover the Conference on Double Taxation and Tax Evasion, Geneva, October, 1928, at which 27 governments were represented, this book affords an unusually good background for understanding the work of that conference and the swing of its majority opinion from a system of relief based on the classification and allotment of taxes towards one consisting in the allocation of kinds of income for tax purposes between the country of origin and that of residence.

The book contains an exhaustive bibliography and is well indexed.

MITCHELL B. CARROLL.

China and England. By Dr. W. E. Soothill. London: Oxford University Press, 1928. pp. viii, 228. Index. 7s. 6d.

This small volume, by the professor of Chinese language and literature of Oxford University, is an amplification of a course of lectures given under the

auspices of the Oxford University Extension Movement. Such a course Professor Soothill is well qualified to give by reason of his long residence in China as well as his intimate association with Chinese education in various parts of that country. The book is divided into fifteen chapters which deal with five main aspects of modern China. Firstly, introducing by means of an historical sketch the political relations of China and England; after which there follows a section upon the question of extraterritoriality; then the subject of trades and tariffs; thereafter some comments upon the cultural importations, and ending with an analysis of the Revolution and Dr. Sun-Yat-Sen's three principles.

Dr. Soothill devotes more than one-third of the volume to a discussion of the question of extraterritoriality, tracing its rise and relation to individuals, thereafter the position of the concessions and settlements, closing this with some comments upon its abolition. His description of the question of extraterritoriality and the effects which have flowed therefrom will be found often of interest, but cannot be considered as a legal presentation of the case for the foreigner or for the Chinese (p. 47). It is curious to note that this volume does not deal with the literary renaissance of China, nor with the attempt to recreate the spoken language, for which Dr. Hu Shih and Chancellor Tsai-Yuan Pei have done so much. In the criticisms of the three principles of the late Dr. Sun-Yat-Sen, Dr. Soothill makes but slight reference to the persistent statement in China that Dr. Sun's will, which is now the gospel of Nationalism, is considered by many in Shanghai and its area to be the work of Dr. Wang-Ching-Hui, the notorious radical who left China when the third government was formed in January, 1928. Despite these and other blemishes, Dr. Soothill and the Oxford University Extension Movement are to be thanked for the publication of this course of lectures.

BOYD CARPENTER.

Pseudo-Security. By J. M. Spaight. New York: Longmans, Green & Co., 1928. pp. vi, 177. Index. $5.00.

This book by an English author is an addition to the growing literature on the important question of security. It is more interesting because it attacks the prevailing doctrine as unsound, and locks horns with those who would use the power of a world organization to enforce it.

Mr. Spaight declares that security itself is a relative term, and that the attempt to deal with it as an absolute quantity has not only failed, but was foredoomed to failure. Then the system on which it depends must be reasonably adequate to meet the danger. So elaborate an organization, based on so unsound a principle, will fail inevitably, and the principle of absolute security becomes in effect nothing but a system of "elaborately organized pseudo-security." Accordingly the author attacks the sanctions provisions of the Covenant which would use "corporate force" against a state resorting to war; criticizes the "Genevan school of thought" which would, through

such agreements as the Pact of Mutual Guarantees or the Geneva Protocol, extend and amplify the sanctions provisions of the Covenant, thus committing to the League the character of a "sanction-wielding superstate"; and through an analysis of treaties and events, concludes that the world is returning to sanity through the Locarno Pacts. World peace by "blockade and bayonet," the League method, had to be speeded up by means of the Geneva protocol, which was an unsound measure to enforce an unsound idea. The problem of the air has intervened to render nugatory the arrangements of leagues of peace for security and the limitation of armaments on land and sea. And finally, with Locarno as a gesture of common-sense in the security problem, let the League of Nations organize peace and for peace, but divest it of its function to maintain it. This should be committed to regions, through "separate regional pacts."

Thus runs the argument. It is unfortunate that the author, having so good an opportunity to analyze the causes for the failure of the League to deal properly with the security question, and with the recent efforts to remedy that failure, has not done so objectively and dispassionately. His own pronounced views, rather than sound conclusions based on impartial analysis, stand out as the leading thread, and therefore the leading defect, of the book. The chapter headings are in the form of indictments and conclusions which the text seeks to establish. The League, the people who are working at the security question, their views, and their efforts are described in terms and in a manner which betrays impatience and petulance. In language of dignified derision, Mr. Spaight declares in effect, "I told you so."

The League supporters and the friends of security have made many mistakes. Perhaps through Locarno we are returning to a better method of dealing with the question. They have not been wrong, however, in turning their backs on an old system, and in trying to use organized power against an aggressor state. Nor can there be any effective settlement of the peace and the security questions—never regarded as absolute—through committing the organization for peace to a world organization, and the determination and enforcement of sanctions to regional groups. The extension of the security idea did not seem to work out. But to return to the old system, as the author would have us do, would lead further into the desert.

CHARLES E. MARTIN.

Latin America and the United States. By Graham H. Stuart. New York: Century Co., 1928, 2d ed. pp. xii, 465. Index. $3.75.

This book, designed primarily as a brief text in American diplomatic and foreign policy in institutions of higher learning, also appeals to the general reader and should prove useful as one means of developing a more sympathetic understanding between the two Americas, in spreading the author's idea of a new Pan Americanism of kindly consideration and coöperation. It is a revision of the author's earlier volume of 1922 and was rendered necessary

by many recent important developments in American relations with Latin America, especially those of the last six years. The first chapter on The New Pan Americanism has been completely rewritten and includes about ten pages on the 5th and 6th Pan American conferences (of Santiago and Havana). Other chief additions include new interpretations of the Monroe Doctrine, extended details on the Tacna-Arica dispute in the chapter on Chile and the War of the Pacific, and considerable enlargement of chapters relating to recent relations with Mexico and other countries of the Caribbean. The total enlargement is about sixty pages.

Lists of supplementary readings, appended to each chapter, have been revised, but do not include several recent volumes which should have been mentioned. Documentary sources of material are cited in footnotes as in the earlier edition, and four simple maps are inserted. Striking omissions include early relations with Peru before 1860 and relations with Venezuela. The treatment of several subjects such as early trade relations, the opening of South American rivers, and the Isthmian transit route is inadequate.

The author, usually impartial, is severely critical toward the Coolidge administration. While apparently approving the Monroe Doctrine as fundamentally a policy of self-protection for the United States, he fears that under Coolidge and Kellogg it has lost its quality as a dignified guaranty of safety to small neighbors, and favors the adoption of some such interpretation as that voiced by President Wilson in order to make it "a truly Pan American doctrine." In criticising the policy of the Coolidge administration, and especially its "blunt" notice of American hegemony north of Panama, he states that "neither by training, experience nor temperament was Secretary Kellogg suited to handle the delicate problems which faced the United States in Mexico and the Caribbean." While commending the unsuccessful Kellogg proposal of a solution of the Tacna-Arica dispute by giving Bolivia an outlet to the sea, he suggests the wisdom of referring the problem to the decision of the World Court and to the executive machinery of the League of Nations. In mentioning the military alliance clauses of the American-Panama treaty of July, 1926, he states that they conflict with Panama's obligations under the Covenant of the League of Nations.

J. M. CALLAHAN.

The Far East: A Political and Diplomatic History. By Payson Jackson Treat. New York: Harper & Bros., 1928. pp. xii, 549. Index. $5.00.

This timely volume, in a field of increasing interest and importance, written by a well-known historical scholar who has long had a special interest in this field, is well suited to its purpose as a text-book for students and a reference work for general readers. It is a comprehensive, clarifying and scholarly summary of recent history and politics in the Far East, written in an interesting and readable style and supplied with good maps and bibliography. Parts one and two begin with a geographical and historical orientation, an

excellent, brief introductory survey of enough of the physical, racial, cultural and political background of China and Japan to enable one to understand the more recent events. A brief summary of the early intercourse of China and Japan with the Occident is followed by a survey of their internal political development to 1895. Part three covers the period since 1895 beginning with the entrance of the United States into Asiatic politics. Some consideration is given to adjacent related countries, Korea and Indo-China, and also to the Philippines, whose acquisition by the United States gave the latter an added influence in the affairs of China at a time when disintegration was threatened. The chief topics after the Russo-Japanese War are the development of Japan's control in Korea, international rivalries in Manchuria, the new reform movement in China and new economical and political readjustments in Japan, with which are properly correlated other events contemporaneously in progress (including the United States in the Philippines and Orientals in the United States). The author states that from the failure of the Knox proposal for the neutralization of the Manchurian railways until 1921, the most serious menace to American-Japanese peace was found in the conflict of policies in China rather than in questions arising from American treatment of Japanese immigrants. The major recent superficial evil in China has been unbridled militarism, whose resulting havoc far exceeds any damaging acts of the foreigners, on whom the Chinese leaders have sought to place responsibilities in order "to divert attention from their own incapacity and misdeeds."

Although usually impartial and restrained in his interpretation of fact, the author shows an unfortunate tendency to minimize Japan's mistakes and to defend or extenuate Japanese policies (especially in relation to Korea and China). He regards the recent settlement of the problem of Japanese migration to the United States as only a temporary one. President Roosevelt's policy in the treatment of Orientals he regards as a sound one, and he suggests that able statesmen should be able to draft an arrangement which would protect every legitimate American interest and at the same time remove all irritating features of existing legislation affecting Orientals.

J. M. CALLAHAN.

Sovereignty—A Study of a Contemporary Political Notion. By Paul W. Ward. London: George Routledge and Sons, Ltd., 1928. (Syracuse, N. Y.: The Hill Bookstall.) pp. viii, 201.

Whatever may be his *point de départ*, the student of international law finds that inevitably all roads lead to Rome—the great problem of sovereignty. This fundamental question has inspired, in recent years, such notable monographs as those of De Lapradelle, Dewey, John Dickinson, Duguit, Garner, Gonsiorowski, Kelsen, Krabbe, Laski, Le Fur and Politis. Hence a book bearing *Sovereignty* as its title is bound to enlist our interest, although upon learning that to this vast subject the author has devoted but

201 pages, we become cautious; we fear to encounter a "manual," with its usual deficiencies,—dryness, banality and superficiality. But this work, despite its brevity, avoids these faults, and is marked by admirable clarity, happy choice of material, and interesting and timely comment and conclusions. It is valuable, therefore, even to the specialist.

In an introductory chapter the author traces the origins of the concept of sovereignty, from the early writers down through Bodin, Hobbes, Locke, Montesquieu and Austin. Chapter II is devoted to contemporary idealistic metaphysics and the sovereign state, with emphasis upon Rousseau, Hegel, Dewey, Hobhouse and Muirhead. Contemporary pluralists are considered in Chapter III, where we find a discussion of Figgis, Gierke, Laski, Cole and Duguit. Chapter IV, which is based largely upon Krabbe, treats of contemporary internationalism and the sovereign state. A final chapter sets forth the author's conclusions.

The term "sovereignty," according to the author, should be abandoned. It has outlived its time, is "useless and confusing" (p. 178), and serves to perpetuate erroneous conceptions. The main problem is to decide whether there is to be a single supreme authority, and if so, who.

The latter's function is to conciliate definitely exclusive interests, particularly by re-grouping them, and by erecting new social authorities. "The term 'authority' is entirely adequate," and should replace the word "sovereignty" (p. 179). In the international realm also the term is inappropriate. There can be no such thing as sovereignty between states, because the term connotes the absence of international limitation, which is contrary to reality. And as further progress in world organization is inevitable, the *soi-disant* sovereignty of the state is destined for further diminution. And so much the better, for the concept of sovereignty, while it has tended to assure, within the state, both stability and peace, abroad it has fostered both anarchy and war. Furthermore, it stimulates blind patriotism and may serve as pretext for battle. While the author, like Krabbe, foresees the creation of an effective international organization, he does not believe that this body will ever be "sovereign." It will act merely to conciliate, in the rôle of an international clearing house, conflicting inter-group interests. An international order fit for this task is incompatible with state sovereignty. The solution as envisaged by the author lies neither in the anarchistic pluralism of extreme individualism nor in the monistic doctrines of a superhuman "common will." "It is along the line of experimental federalism" (p. 190).

One wonders whether the suggestion that the term "sovereignty" be discarded is sound. Even if this could be accomplished, which is doubtful, the fundamental problems would remain unsolved. Thus call it "authority" or "sovereignty," whether this is to be vested in the states or in the international community is the great problem of the *droit des gens*. We question also the assertion that the international body conceived by the author would not be "sovereign." If it has the power to conciliate conflicting interests,

which the author admits, it would appear to be sovereign. But all internationalists should approve the conclusion that a stable international order is incompatible with sovereignty in the states, if by that term is meant absolute sovereignty which admits of no external limitation. In these days of codification one regrets that the subject is not one adapted to a definition of terms by international agreement.

JOHN B. WHITTON.

Die Widerlegung der Versailler Kriegsschuldthese. By Alfred von Wegerer. Berlin: Reimar Hobbing, 1928. pp. 237. Mk. 8.

The present volume, written by the editor of *Die Kriegsschuldfrage*, embodies the most serious and competent effort put forward by German scholarship in an effort to dispute what its author, and those who stand with him, in Germany and elsewhere, including the United States, understand by Article 231 of the Treaty of Versailles. It therefore deserves most respectful and thorough attention. The treatment of the problem is based upon two propositions, namely, that "*wenn Deutschland nicht schuldig ist, so ist der Friede unrecht*" and that "*er ist es sogar, wenn die Verantwortlichkeiten geteilt sind*," which are translated (p. 9) from an item in the *Figaro* of 17 July, 1928. A *Vorwort* in which the general position of the author is stated leads to a description of the origin and background of the Versailles doctrine of war guilt, a critical examination of the materials cited in the Report of the Commission of the Peace Conference on the Responsibility of the Authors of the War, which led to the incorporation of Article 231 in the Treaty of Versailles, and an attempted refutation in detail of the charges and decisions contained in that report, as well as of certain broader charges made against Germany (militarism, autocracy, etc.) in the ultimatum and covering letter of 16 June, 1919. A few documents form a short Appendix.

As he has already indicated, the reviewer regards the present volume as probably the best German representative of the school of thought to which it belongs, although it must be considered in connection with that school as a whole, and no serious student of the problem will be content to rest without consulting also the various French, English and American writers on the subject, Renouvin, Fabre-Luce, Gooch, Barnes, Fay, to mention only a few, and the documents themselves, in so far as time and the library facilities available to him make that possible.

On the other hand, the reviewer cannot but disagree with the author of the present work, and with those who share his view, when he claims (pp. 8, 9) that refutation of the Versailles thesis is the way to relief for Germany from any unjust terms of the peace treaty of 1919 and to international amelioration generally. Formal revision of the Treaty of Versailles must probably remain politically impossible to obtain at any time in the future which can now be foreseen, assuming formal revision to be desirable. Informal revision, or moderation of such provisions of the treaty as prove unsound, is going

on without formal textual revision, contrary to the implications which are to be inferred from the position taken by the revisionists. And, finally, the attempt to secure formal revision and a repudiation of the thesis of Article 231 is exactly the action calculated to retard such a development. As for the statement that it is in the United States that revision of the doctrine of Article 231 has made most headway and that it is on this account that friendly relations between the United States and the defeated nations are most possible, this seems somewhat imaginative in more ways than one.

The fundamental idea in the dialectic of the present work, however, an idea which runs through the whole war-guilt controversy, including the works of Fay and Barnes in this country, is the idea that Article 231 of the Treaty of Versailles imputes to Germany and her allies sole or exclusive responsibility for the war (*"das in Versailles gefällte Urteil dass nur die Mittelmächte, insbesondere Deutschland, für den Krieg verantwortlich seien"*; p. 10). Coupled with this idea is the claim that if the responsibility for the war can be shown to be divided, then the liability imposed upon Germany and her allies is unjust. The latter claim is made by von Wegerer in the use of the phrase from the *Figaro*, already quoted, but neither this claim nor the interpretation of Article 231 which it is used to supplement are discussed or elaborated in the text.

Now it is true that the Report of the Commission on Responsibility, in its first paragraph, imputed responsibility for the war "wholly" to the Central Powers, and it is the report rather than Article 231 to which von Wegerer devotes most attention, in spite of the fact that the latter alone has final official standing. But even the German text of the report translates this term merely as *"in vollem Umfange"* (p. 226), and nowhere in the context of the report nor in its conclusions is anything said which imputes sole responsibility to the Central Powers. Nor, finally, is there any such charge made in Article 231; Germany and her allies are, in both the French and English texts, assessed with liability for all the losses and damages suffered by the Allied Powers, but there is no charge of sole responsibility for the war in that article. It was Brockdorff-Rantzau's reply of 7 May, 1919, which interpreted the charge of Article 231 as a charge of exclusive responsibility.

The interpretation is quite unjustified in the broad sense in which it has been used in the war-guilt controversy. The authors of the report and the treaty did not intend anything quite so ridiculous as a charge that only Germany and Austria had had any part in the processes, more remote or more immediate, which brought on the war. They charged Germany and Austria with *precipitating* the war, with committing those overt acts which in the later stages of a chain of causation served to bring about the undesirable end in the face of conditions so firmly fixed and so well known that there could be only one foreseeable result to follow those acts. It is a charge of dominant responsibility, substantial responsibility, rather than a charge of complete responsibility or, indeed, of any minutely measured degree of responsibility.

It is this sort of effective responsibility that creates liability in any known system of criminal law or governmental practice; nowhere is such an imaginary thing as sole responsibility required as a basis of liability, and Article 231 was not based on a fantasy. As another leading revisionist has admitted, it is doubtful whether all the dangerous tendencies toward war existing in 1914 would have led to war by themselves; it was action taken by Germany and Austria in the face of existing conditions that actually brought on war.

The basis for the charge that Germany and Austria precipitated the war is, of course, the Austrian ultimatum and declaration, together with the German pledge of support upon which they were based, and the German declaration upon Russia. The assassination of Franz Ferdinand itself did not necessarily mean war, for the Austrian ultimatum itself offered a chance, slim though it was, of peaceful adjustment. The Austrian declaration meant almost certain general war, however, and Austria acted on the basis of German support. It may be accurate to say that neither Germany nor Austria wanted or plotted a general European war in itself, but Austria did want and did plot war upon Serbia, and Germany had consciously willed war upon Serbia if Austria should so determine even if that meant general war. Austria and Germany are to be absolutely identified in that action. It is claimed that Germany later "canceled her blank check to Austria"; unfortunately one cannot stop payment on a check which has already been cashed.

It would, of course, be possible to turn the discussion onto another plane entirely, and argue that though responsible in fact for starting war upon Serbia in 1914, Germany and Austria were ethically justified in this action. There are traces of this point of view in von Wegerer (pp. 37 s., 144 s.), as in other revisionist writings. In any such controversy, however, the preservation of Austrian imperial domination over Hungarians, Czechs, Roumanians, and Serbs is not likely to commend itself as a superior ethical purpose as against national unity and independence for the Southern Slavs.

Moreover, this line of thought is related to the implication and the assertion (p. 161 s.) that it was the Russian mobilization and not war upon Serbia that brought on general war in 1914 and that Russian mobilization was not justified on grounds of Russian security or on any other ("*sonstige*") grounds. This can only be based on the assumption that Russia, not to mention the rest of Europe, should for some obscure moral reason have stood aside, as in the Bosnian crisis of 1908, and allowed Austria to lay the Germanic pavement to Constantinople upon further conquest of the Balkan Slavs. The only way in which Russian mobilization could have been practically and with justice prevented was by reliably reassuring Russia and Europe concerning Austrian intentions in this connection, and this was impossible, in view of Austrian intransigeance, based upon the original German pledge of support. Finally, in order to confine Russian action to mobilization it would have still been necessary, and probably sufficient, to give Russia convincing assurances of the same sort, and though this might have been more practicable now

with Austria slightly scared by developments, Germany instead declared war upon Russia at the urging of her military leaders and upon technological grounds of military art entirely distinct from the merits of the international controversy.

The motives actuating the revisionist are not without significance. Devotion to the truth in history cannot be too highly prized, and what the revisionists have done to reveal the complexity of the processes which led to the war, together with the way in which responsibility or participation in those processes was divided, is of inestimable value. But if the aim of the revisionist is to contribute to progress in the conduct of international affairs, as von Wegerer suggests (p. 6), there are certain pitfalls to be avoided. One is historical and political obscurantism, deliberate or accidental. One must distinguish between minute historical accuracy and fruitful analysis; simplicity has been rightly said to be an enemy of precision in a complex situation, but to establish the record or disprove an opposing version of the record by elaborate documentation and dialectic is less to the point than a balanced analysis and maintenance of a just proportion among all relevant considerations. Moreover, in such problems as the present problem, responsibility is always divided and more divided the further back one goes. Hence it is that for purposes of fixing criminal responsibility the art of government turns to the overt act or the decisive action at the end of the chain. It may seem hard to let go free those who make or help make up a situation and penalize only the individual or nation which is finally pressed so hard as to be compelled to break the law, but that is sound and accepted social practice the world over; perhaps there must needs be offenses, but woe to him through whom the offense cometh. This is in fact the doctrine of the aggressor nation, made more familiar in post-war years but reaching back to 1914 and, in its infancy, to 1870, when, as has been said by one who misprized the doctrine of the aggressor nation, France "made the mistake of being the formal aggressor." The fact is that Germany and Austria were caught in 1914 in a change of international ethical fashions and standards similar to that which, or another phase of which, caught Japan in her imperialistic advances upon China in 1918. It might be fairer if we remembered that in 1914 war as an instrument of policy had not yet been clearly stigmatized as an international crime.

PITMAN B. POTTER.

Economic Foreign Policy of the United States. By Benjamin H. Williams. New York: McGraw-Hill Book Co., Inc., 1929. pp. xii, 426. Index. $4.00.

Writing from the University of Pittsburgh, in the midst of American industrial life, Professor Williams has prepared a textbook for college students, and a manual for the general reader, in the field of international economic relations and the economic aspects of diplomacy, that is at once admirable in

tone, clear and readable in style, and adequately equipped with facts both historic and current. He has creditably added to a literature the increase in which at present can only be regarded as a happy augury.

After discussing in his introduction the place of the economic motive, Professor Williams divides his volume fairly evenly into two parts, The Diplomacy of Investment and The Diplomacy of Commerce. The former and somewhat longer portion of the book is divided into eleven chapters which deal chiefly with the economic expansion of the United States in the western hemisphere, but which contain also ample discussion of the policy of the government in regulating loans generally and of the interallied debt problem. One of his most interesting chapters, entitled The Due Process Doctrine, describes, particularly with reference to Mexico, what he believes to be a sustained effort on the part of the United States to establish in other countries its ideas of correct judicial procedure and of vested rights. He believes that "The attempt of the newer Mexican leaders, Carranza, Obregon, and Calles, to reverse" the "tendency toward monopoly and redistribute the land among the people is one of the most praiseworthy efforts of statesmanship which the western hemisphere has witnessed in the present century."

Professor Williams is definitely a realist. He entitles one of his subdivisions General Worthlessness of the "Moral" Arguments. But he is sure that no nation "can prosper permanently by an act that will lower general international standards of life," and he has his doubts when he reads such statements as that the United States was "entirely disinterested" (quoted from the Secretary of State) in its occupation of Haiti.

With reference to the debt problem, he feels that a distinction may appropriately be drawn between "intergovernmental debts for war purposes" and "the system of private loans for constructive purposes," and that the cancellation of the former would not involve the same shock to credit as would repudiation in case of the latter.

The seven chapters relating to commerce deal with bargaining tariff laws and reciprocity agreements, the most-favored-nation clause, the Open Door, shipping policies and raw materials. They maintain the realism and progressive outlook of the earlier chapters and set forth an attitude toward international trade that may be accepted as in all respects sound. Happily it is in large part the policy of the United States. Professor Williams is, however, quick to detect the difficulties that beset the government in its effort to obtain a world-wide program of equality of treatment in the face of the effort of continental Europe, particularly France, to insist that, beyond a certain point, the high tariffs of one party to a treaty are inconsistent with a claim for equality of treatment in the territory of the other. He has little patience with the denial by the United States of the Open Door in the Philippines while insisting upon it in China. He might also have raised the question whether, in view of the extension of the American coastwise ship-

ping monopoly to Samoa, the Open Door can be said to be maintained there.

Professor Williams calls, in his conclusion, for a social point of view in dealing with both domestic and international economic matters and voices a wholesome fear lest the influence of business groups, which are "the most intelligently class conscious elements in American society" may not be in harmony with the dictates of that wise statesmanship which should take "into consideration the interests of the whole nation, today and tomorrow."

WALLACE MCCLURE.

BOOK NOTES

Der Kellogg-Pakt im Ramen des Kriegsvorbeugungsrechts. By Karl Strupp. Leipzig: Robert Noske, 1928. (*Frankfurter Abhandlungen zum Kriegsverhütungsrecht, Heft 9.*) Universitätsverlag von Robert Noske in Leipzig, 1928. pp. 83 Rm. 5.

This is one of the numbers of the new series on the avoidance of war edited by Professors Giese and Strupp in Frankfurt. There are ten numbers to date and the series is to be continued. The present pamphlet, in conformity with the serial title, is a brief statement of the evolution of the idea of peace from 1899, the first Hague Conference, when the motto *si vis pacem para bellum*, which still obtained in international relations, was transformed to *si vis pacem, para pacem*, then advanced to the avoidance or prohibition of war, and finally, in the Kellogg Pact, to the "outlawry of war." The author's discussion of the subject runs through the first 22 pages, while the appendix of 60 pages contains the diplomatic correspondence between Washington and the various Powers that considered the Peace Pact, the last recorded being the reply of Japan, July 22, 1928. Authorities on international law will find nothing new in this pamphlet, but the general reader, and those who have not followed the treaty in the making, will find here an excellent summary of the development of the latest, and perhaps most advanced, ideas of international peace.

Der Lausanner Vertrag und der griechisch-türkische Bevölkerungsaustausch. Prof. Dr. G. Streit. Berlin: Georg Stilke, 1929. pp. 71, Mk. 3.

The compulsory "exchange" between Greece and Turkey of more than a million and a half of their people, in accordance with the Treaty of Lausanne (1922), was an event so unusual in international relations that it transcends the immediate interest of the contracting parties and may well receive the attention of the general student of international law. It is perhaps the first time in history that so large a population was placed at the disposal of two feeble states through a conference that acted without the consent or wishes of the population transferred. In this pamphlet Dr. Streit, former Greek Minister of Foreign Affairs, gives an account of the technical execution and

the economic results of this exchange of human beings and subjects the entire transaction to an historical and a legal analysis. It is an impartial, a clear and dispassionate study.

Russland und Westeuropa. Prof. Dr. Michael Freiherr von Taube. Berlin: Georg Stilke, 1928. pp. 63, Mk. 2.50.

This study by a former Russian minister is a sketch of the international history of Russia given with a view to explain its relation to the European family of nations today; for the complicated problems that the Russian complex now presents, can, in the opinion of the author, be understood only in the light of the past. There are three periods: the first from the middle of the ninth to the middle of the thirteenth century, before the Tartar invasion, when Russia was a part of the European states' system; the second, or Muscovite period, during which Russia was isolated from the West, which closed at the end of the sixteenth century; and finally, the Romanoff period when it was again a member of the European family and remained so until it was again excluded as a result of the events growing out of the World War. That the present tension between Russia and Western Europe is a constant danger to peace, that Russia, though having an individuality peculiar to itself, belongs to the West rather than to the East, and that the solution of the problems arising from a relationship between the "East and West" should engage the attention of Western scholars and statesmen, may be said to be the laudable purpose of this sincere, thoughtful and well-written pamphlet.

Die elsass-lothringische Staatsangehörigkeitsreglung und das Völkerrecht. Dr. Walter Schätzel. Berlin: Georg Stilke, 1929. pp. 216, Mk. 11.

That Hindenburg acquired Polish nationality through the loss of German territory to Poland is a fact so singular and striking that it is generally known, but it is not so generally known that every German—even though he may never have seen France or Alsace-Lorraine—who happened to have a grandmother of Alsatian extraction legally exchanged his nationality for that of France through the signature of a group of diplomats at Paris. The regulations governing nationality in Alsace-Lorraine constitute, according to Dr. Schätzel, one of the most bizarre and curious examples of the many injustices inflicted upon Europe by the Treaty of Versailles. The exclusion of more than one-third of the population from French nationality and, conversely, the imposing of French nationality upon 513,000 Germans living in Germany, the division of the population into four classes for discriminatory purposes, conferring different nationalities upon members of the same family, denial of every option and of retroactive acquisition of nationality if favorable to Germans, are some of the results of these regulations—regulations without precedent in history or in other Paris treaties. A mass of

literature dealing with this subject has already been issued, and this, together with the treaty provisions, decrees, court decisions of every grade and order, has formed the material upon which the author has drawn. The importance of the work, however, is not so much in its portrayal of local conditions created by these regulations as in the fact that the author treats the subject in the light of general tendencies at the present time and the possible future development of nationality and its recognition or place in international law. The mere fact that the number of persons who exchanged their nationality as a result of the World War was larger than the entire population of Europe at the time of the Congress of Vienna indicates the importance of the problems here discussed, and the subtitle, "A comparative legal study of the problem of nationality through change of territory," will serve to mark its place in the literature of international law. The first 152 pages are devoted to a discussion of the subject; the next 60 pages to original documents; and fortunately, what is all too rare in German works, it also contains an index.

All three of the above studies are *Aus den Institut für Internationales Recht an der Universität Kiel*, edited by Professor Walther Schücking.

KARL F. GEISER.

Economic Problems in Europe Today. Edited by W. Henderson Pringle. London: A. & C. Black, Ltd., 1928. pp. xii, 146.

This volume consists of six addresses delivered by various scholars and publicists at the City of Birmingham Commercial College in 1927, and it indicates that the college authorities were quite successful in conducting an appropriate lecture series for students interested in the broader aspects of commerce. Like most volumes compiled from contributions by unrelated authors, the book is not organized according to a consistent plan. The chapters on France, Germany, and Belgium, by George Peel, W. H. Edwards, and Emile Cammaerts, respectively, have a common scheme in that they deal with economic reconstruction. Statistics showing marked improvement over the figures of the early post-war years are presented under such heads as Production, Budgets, Currency, and Foreign Trade. The picture is, on the whole, rather an optimistic one. The chapter on Italy by G. Salvemini is an ardent attempt to disprove what the former Florentine professor calls the "legend" that an economic miracle has been performed by Mussolini and his associates. Professor R. W. Seton-Watson, who treats of Czechoslovakia, deals more with the historical, political, and sociological aspects of his subject than with the economic. Michael Farbman interprets the Russian Revolution and asserts that the only really important result has been the transfer of land to the peasants. The book does not pretend to present a thoroughgoing treatment of its subject. Nevertheless, in making available these lectures, the authorities of the Birmingham Commercial Col-

lege have provided for the general reader an interesting introduction to the present European situation.

BENJAMIN H. WILLIAMS.

The Making of the Fascist State. By Herbert W. Schneider. New York: Oxford University Press, 1928. pp. xii, 392. Index. $5.00.

There is already in existence a good measure of panegyrical literature on Fascism. Yet, this book is distinctly worth while. In five chapters, dealing with War and Empire, Revolutions, the Fascist State, Syndicalism and the Corporate State, and Fascist Culture, the author undertakes an interpretation of Fascism, the dominant theme of which he promises to be "the interaction between fact and philosophic fiction, between practical exigencies and social theories, between mind and body." But only if one agrees with the inferences which the expression "philosophic fiction" is apt to convey, is it possible to concede to the author that his book is "a laboratory study of the mind and imagination at work." Put more simply, *The Making of the Fascist State* paints a sympathetic panorama of the many intellectual aspects of anti-intellectual Fascism, though without acknowledging the good previous work done along this line by certain other authors, notably W. Y. Elliott. This "Mirror of Fascism" is enlivened by copious quotations from Italian writings and contains a good deal of information hitherto unavailable in English. The usefulness of the book in this direction is increased by more than 100 pages of selections from Fascist literature and documents. Of these selections and documents the second part, dealing with international relations and the new Roman empire, which corresponds to the latter portion of Chapter I, will perhaps prove most interesting to students of international law. However, one looks in vain for much reference to those materials available outside of Fascist sources proper. A bibliography with comments selected along somewhat similar lines, though filling 20 pages, concludes this welcome addition to the current literature on Fascism.

CARL JOACHIM FRIEDRICH.

Las Relaciones entre Mexico y el Vaticano. By Joaquin Ramirez Cabañas (Archivo Histórico Diplomático Mexicano, Núm. 27). México: Secretaría de Relaciones Exteriores, 1928. pp. xciv, 238.

The first 94 pages, entitled Introduction and described by the author as a preliminary study, contain a narrative of the relations between the Papal Court and the Government of Mexico from the establishment of independenec in 1821 to the separation of the church and the state in 1860, concluding with a few remarks regarding the relations of other Spanish American governments with the church. This introduction is subdivided into twelve sections. The last 238 pages contain the texts of the documents, a few more than a hundred, showing these relations from the decree of May 4, 1822, regarding envoys to

foreign Powers (including the Papal Court), to an instruction addressed on April 30, 1861 to the Mexican envoy in Rome. At the close of each document is a reference to the source from which it is taken. Most are from the archives of the *Secretaría de Relaciones*. A few of the documents are in Italian, but nearly all are in Spanish. As in the case of other volumes in the series, there is no index but a list of the titles of documents occupies the last three pages. Students of the recent seriously strained relations between the Mexican Government and the Catholic Church should find much of interest in this collection of documents showing earlier relations.

WILLIAM R. MANNING.

Études d'Histoire Pacifiste—Bayle (1647–1706). By Madame Elise Constantinescu-Bagdat. Paris: Les Presses Universitaires de France, 1928. pp. 120. Index. Fr. 25.

Heading for War, What You Ought To Know and Fear. By W. H. Edwards. New York: Payson & Clarke, Ltd., 1928. pp. 162. $1.50.

Back of War. By Henry Kittredge Norton. New York: Doubleday, Doran & Co., Inc., 1928. pp. xviii, 356. $2.50.

Madame Constantinescu-Bagdat has already given us her little volume on *La "Querela pacis" d'Erasme*, and her much larger work entitled *De Vauban à Voltaire*, both excellent accounts of historic pacifists. Her present treatise on Pierre Bayle is third in the series. A fourth, *De Rabelais à Labruyère*, is in preparation. Bayle, a forerunner of modern skepticism, is comparatively little known in America. He was more than a critic; he was a creative force. This little book shows him as a defender of religious tolerance. The author is happy in trying here to show the relation of this aspect of Bayle's work to the cause of international peace. She achieves her purpose. The book should be translated into English. It is needed in America just now.

Dr. Edwards delves into the history of the last twenty years, pays his respects to Mussolini, which are not so respectful, and devotes a chapter to the estrangement of Western Europe and the United States. The most remarkable thing about the book is the number of quotations from newspapers, with which the author supports the trend of his thought. He reaches his climax in a program formulated by the *Washington News*, and asks if the United States wishes to witness the repetition of the horrors of the World War or to pledge the political and economical influence of this country in support of the program of that paper. After all, Dr. Edwards knows a good deal about the United States, for a foreigner.

Back of War gets after the causes of international conflict with greater coherence and a richer background than most of the books in this field. The second part of the book has seven chapters, one devoted to each of the seven great Powers, and eight chapters on regional problems, ranging from the Far East to Mexico and the Caribbean. It is an informing work, and should have been indexed. The author acknowledges that nations have vital in-

terests destined frequently to conflict. Since "pacific means," provided in the Kellogg Pact, must play such an important part in any "continued peace," one wonders how such a careful student could conclude that "our only hope for an era of continued peace is to recognize and deal with the causes of international conflict." Too, one lays down the book with the feeling that the author has not proved that most of the real causes of war are economic. What the author starts out to show is that there is a vast amount of constructive work, first in eliminating the superficial causes of international disputes, and then in finding adequate means to adjust the vital conflicts that lie underneath. His studies are more convincing than his conclusions on both of these points. He believes that it will be possible yet to untangle and coördinate human forces, economic, and psychological, until a "continual coöperation shall replace the interminable conflict." No one would wish to take exception to such a confession of faith.

ARTHUR D. CALL.

Bolshevist Russia. By Anton Karlgren. Translated from the Swedish by Anna Barwell. New York: The Macmillan Co., 1927. pp. 311. $3.50.

Lenin. By Valeriu Marcu. Translated by E. W. Dickes. New York: The Macmillan Co., 1928. pp. 412. Index. $5.00.

Russian Economic Development Since the Revolution. By Maurice Dobb. New York: E. P. Dutton & Co., 1928. pp. xii, 415. $5.00.

The Russian Revolution. By James Mavor. New York: The Macmillan Co., 1928. pp. 470. $7.50.

Professor Anton Karlgren has not written with the view of stirring hostility against the Soviet régime, but his analysis is informed with interminable plaintive regrets for a vanished squiredom and with a philosophy of an irreconcilable moral conflict between communism and Western capitalism. In his pages, the peasants are forever pillaging and murdering their former masters, retelling their deeds as if they were "the most natural thing in the world." And every pillaged "big house" seems to have been a storehouse of old libraries with "valuable hoards of books, art collections, antique pieces of furniture, etc." Nothing is saved, since to matters of culture the Bolshevists are "more than indifferent." He declares that the peasants have not the "slightest wish" to learn new things about agriculture, thankful of having "no interference with their inheritance from the past," nor do the Bolsheviks endeavor to pull up Russian farming from "the decay of centuries." It is difficult to understand under these circumstances the reasons for the truly unprecedented importation and home production of tractors in Soviet Russia, the growing use of electricity and radio in the villages, and many other evidences of modern equipment, unless they be regarded as political tricks or as a wasteful use of the Tsars' gold. In the cities and towns, the school system is reported to lie "in dust and ashes," and Bolshevist activities in matters of school education are compared to a "first-class

pogrom," a total annihilation. "Culture and scholarship are crushed by the bear's paws of Bolshevism." Doubtlessly Soviet Russia is not an ideal commonwealth; yet the impartial critic with a sense of humor for the frailties of human nature and government finds it difficult to indict the Soviet rulers for their refusal to admit hostile journalists to their country, since nobody enjoys the fun of being the butt of every dull wit for endlessly dull hours.

Marcu's biography of Lenin has none of the painstaking details, or analysis, or chronicling of events for their own sake and value. His work is wholly a selectively artistic, brilliant story of the popular hero-deliverer, a symphony of Russian vastness and her man of destiny. Before 1917, Lenin is the impotent rebel with his burning thoughts, moving, ever a hungry and cold fugitive, against Russia's dim-grey horizons, a small voice of protest lost in the immensity of the steppes, a rebel ever planning, writing, lecturing, and waiting as only a peasant can wait. Then Lenin's "ride into history" and to leadership, still a simple man, the reincarnation of a deliverer in folk tales and legends, and yet a hero bestriding a continent. Nonetheless, the realism of the life of Lenin is utterly remarkable, the impression totally authentic as that of a great portrait. One beholds not Lenin the thinker and debater at party sessions, not an ogre, not a legend, but a simple human figure, a man heroic because his people have suddenly risen to a gigantic stature. "Triumph brought him personally not even a new suit," such was Lenin. How may one disbelieve in Russia's future, when the leader, the terrible Lenin, could greet the new year with the wish addressed to his communist followers, "Let us hope we make fewer mistakes this year than last."

Taking up the work of Maurice Dobb, one encounters an authoritative, dispassionate, profound, and yet lucid examination of economic and political realities. It is the work of a scientist, who is also the first Western economist of training and ability to study the Soviet economic state historically and analytically. Mr. Dobb unfolds by historic stages the communist enterprise from its precarious beginnings, and he evaluates comprehensively each separate phase against its own background of changing circumstance. Especially illuminating to every student of Soviet economics and politics is the detailed examination of the policies of Lenin the statesman, his transformation from a revolutionary leader into a communist-conservator. Communism, to Lenin, was a form shaping itself to the contours of time and place and experience; the only basic principle to which he held firm being the idea of a classless society slowly ridding itself of private monopoly and differential advantages. In the second part of his work Dobb traces Russia's recovery and reconstruction, in the midst of political and financial handicaps, and the work of integrating on a national scale the economic life of the nation. Considering the survival of old bureaucratic methods and attitudes and the lack of foreign capital loans, Mr. Dobb regards the progress of economic recovery surprising and stupendous. Yet more pregnant with significance for the future of industry and world economy generally, is the

system of centrally planned and integrated production and exchange, in which Soviet Russia has already achieved important economies by comparison with capitalistic business methods. But the author doubts whether Russia could carry out her plans of expansion without the aid of foreign loans, depending solely on the slow accumulation of capital at home. He doubts, but leaves the question open.

Professor Mavor intended his present work as a sequel to his *Economic History of Russia* published in 1914. In this volume he is dealing with economic aspects chiefly, considering political and military affairs only incidentally. But the work suffers from the fact that that solid scholar had really not the opportunity of independent observation in Russia and that his sources came from friends and other friendly agencies. A second defect of Professor Mavor's work arises from a certain dogmatism which oversimplifies the socio-economic processes of Russian history. He regards *fear* as the all-revealing secret of the fall of the monarchy, the revolution, the terror, and the apparent permanence of communist power in the country. To hold that the Russian people have only exchanged their former slavery for a new mastership does not help to understand the ten-year period of communism. Obviously, the author's sense of communist futility is personal, since it does not necessarily flow from the facts revealed unto him by the incomplete documentary evidence. If there is life and vital activity, so vital in fact that one cannot prefigure their direction and future, it seems inconsequential to introduce the categories of positive and negative, as though the period of communist history is completed, or to judge it by a conception of progress derived from the past of Europe.

EUGENE M. KAYDEN.

The White Man's Dilemma. By N. Peffer. New York: John Day Co., 1927. pp. x, 312. $2.50.

Shortly put, the volume might be viewed as an attempted parallelism of the saying, "War does not pay," but put forward under the idea that force in any form of human activity, be it economic, industrial, or financial, is in the final analysis incapable of supplying a remedy to modern problems, whether national or international. The sixteen chapters deal with many aspects of aggressive Imperialism, the meaning of which the author (page 4) attempts to define by its actions, saying: "The political history of the last hundred years has been the conquest of nearly all the world by that part of it which lies in Western Europe and North America." The author claims that the century of conflicts and conquests has been succeeded by an era of revolt of the conquered. Again on pages 30 to 32 he seeks to explain this, by claiming that the day of Colonialism is long gone, and that modern Imperialism in action, of which China is the classic example, does not want to take over government or assume sovereignty over areas as in bygone times, but sets up such a régime as will enable the Imperialist power to exploit for itself the particular

area or country most satisfactorily, which can be most readily and easily obtained by economic conquests or financial penetration. There is in the book little attempt to connect the arguments with the question of international relations, and none to indicate that a solution may be expected from the codification of international law. It is rather as a question involving the economic and social status of individuals that the subject is presented.

BOYD CARPENTER.

China and World Peace. By Mingchien Joshua Bau. New York: Fleming H. Revell Co., 1928. pp. 194. $2.00

Dr. Bau has contributed another study of the problem of international relations in the Far East. He presents, from the Chinese point of view, the problems of tariff autonomy, extraterritoriality, and foreign concessions and settlements in China. The treatment is fair throughout, and the book can be recommended for those who desire a word picture of the contemporary Chinese position in world politics in small compass. Of course, the reader must make allowance for the Chinese bias of the author, but it is gratifying to be able to secure in such convenient form so clear a presentation of China's case. A valuable feature of the work is the collection of appended documents underlying the problems which are discussed in the body of the book.

L'Aspect Véritable de l'Affaire. By Paul Pictet. Geneva: Librairie Payot & Cie., 1928. pp. 237. Fr. 5.

The book comes from the pen of one of those intimately in contact with and participating in the negotiations over Gex and Haute-Savoie, and is an answer to the "biased" report made by M. Berard to the French Senate on October 20, 1927. Therefore, not for an instant does the author forget his object of dignified attack, namely, the misrepresentation of the case before the French Government. Yet the attack never becomes rabid. It is true that at times the reader is indulged with such interesting interpretations as that the Swiss are not three races, but twenty-five nationalities. But these are of minor significance. The work itself is of especial significance to the readers of the JOURNAL for several reasons. First, it gives an intimate picture of the neutral Switzerland during the war. Secondly, it demonstrates the French abrogation of the 1815–1816 treaties. Thirdly, it presents a graphic picture of the methods by which the Swiss carry on their diplomatic negotiations. Fourthly, it considers the ratification of the pertinent treaties in the case. Fifthly, it demonstrates the referendum as it is applied to international problems in one of the most advanced democracies in the world.

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SOME BRITISH OPINIONS AS TO NEUTRAL RIGHTS, 1861 to 1865

By James P. Baxter, 3rd
Assistant Professor of History, Harvard University

In the controversy between Great Britain and the United States as to neutral rights from 1914 to 1917, both governments appealed again and again to precedents of the American Civil War. British prize courts as well as British diplomats made effective use of the Civil War decisions. Indeed, Professor A. Pearce Higgins has recently gone so far as to assert that, if one views the decisions as a whole, there was no greater extension of the principles of international law by the decisions of British prize courts during the World War than in the American cases.[1]

Until recently the correspondence exchanged between the British Foreign Office and the Admiralty, and between the Admiralty and the British commander-in-chief in American waters, indispensable for any detailed study of the development of British policy as to neutral rights in the Civil War period, has been inaccessible. The recent opening of the Admiralty Papers in the Public Record Office to 1878, however, and the granting of permission to use the opinions of the Law Officers of the Crown, hitherto confidential, have brought to light much new material revealing British official views of international law in one of its important periods of development.[2]

The new documents clearly indicate the reluctance of the British Government to press neutral rights to a point which might later embarrass the exercise of the British sea power. Although Great Britain and the United States had for once exchanged their traditional rôles of belligerent and neutral, both governments saw clearly that the precedents they were making would have great weight in a future war, when British prize courts would cite the new

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[2] See the writer's article, "The British Government and Neutral Rights, 1861 to 1865," and accompanying documents, in the American Historical Review, October, 1928. These documents form part of a collection made with the aid of a grant from the Bureau of International Research of Harvard University and Radcliffe College, and were photostated or transcribed by Mrs. V. Heddon, of the Admiralty Library, London. Permission to use the opinions of the Law Officers of the Crown was obtained through the kind intervention of William Perrin, Esq., O. B. E., the Librarian of the Admiralty.

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American decisions to justify British interference with the rights of American neutral shippers. Both the precedents of the British past, and the future interests of British sea power alike dictated decisions favoring the belligerent who was dominant at sea. As a result, although the Crown lawyers strove to hold the balance fairly between the contending belligerents, the scales often tipped in favor of the North.

At the outbreak of the Civil War the Law Officers of the Crown were Sir John Harding, Queen's Advocate; Sir Richard Bethell, Attorney-General; and Sir William Atherton, Solicitor-General. When Bethell, as Lord Westbury, became Lord Chancellor in June, 1861, Atherton took the vacant post and Sir Roundell Palmer, later Earl of Selborne, became Solicitor-General. Owing to the breakdown of Harding's health shortly before the departure of the *Alabama*, he was succeeded on August 14, 1862, by Sir Robert Phillimore, the learned author of the *Commentaries upon International Law*, who had served as Admiralty Advocate since 1855. Atherton, an advanced liberal, who had served as judge-advocate of the fleet and standing counsel to the Admiralty from 1855 to 1859, resigned in the autumn of 1863 on account of ill health. Palmer took the vacant post, and was succeeded as Solicitor-General by Robert Porrett Collier, later Lord Monkswell, who in July, 1862, had given to the American Minister, Charles Francis Adams, a well-known opinion in favor of the seizure of the *Alabama* for violation of the Foreign Enlistment Act.[3]

While American and British officers were learning their somewhat unfamiliar rôles as belligerents and neutrals, there was serious risk of a clash between them in American waters. "In critical times," as Adams remarked in December, 1861, the mistake of a naval officer may in a moment overturn the firmest superstructure."[4] Fortunately for both countries, Admiral Sir Alexander Milne, the commander-in-chief of the North America and West Indies station from 1860 to 1864, showed high qualities of tact, impartiality, sound judgment and legal knowledge. Keeping a tight rein on the pro-Southern sympathies of most of his subordinates, he contributed in no small degree to the shaping of British policy and the maintenance of peace.[5]

Milne frequently criticized "the high handed manner in which the United States were inclined to exercise their Belligerent rights, exhibiting a marked contrast to the views they took of those rights when formerly they were

[3] Dictionary of National Biography, *s. v.*, Atherton, Bethell, Collier, Palmer, and Phillimore. For the procedure followed in submitting questions to the Law Officers, see Selborne, Memorials, Part I, Vol. II, pp. 377–381. Until Phillimore's appointment in 1862, the Queen's Advocate had precedence over the Attorney and Solicitor-General. *Ibid.*, p. 378. In September, 1862, Travers Twiss succeeded Phillimore as Admiralty Advocate. Adm. 3/270.

[4] Massachusetts Historical Society Proceedings, Vol. XLV, p. 92. Adams to Motley, Dec. 4, 1861.

[5] *Cf.* the writer's article in the American Historical Review, cited above.

themselves the Champions and advocates of Neutral powers."[6] As to the manner in which Federal cruisers exercised the right of visit and search,[7] he complained to Lord Lyons, May 29, 1862, that it was at least contrary to that "international courtesy which modern usages require . . . 1. That Ships of War should visit and search Neutrals, and then refuse to give their names. 2. That guns should be fired, or any offer or attempt made to bring a neutral to, without the Cruizers colours and pendant being shewn. 3. That any opprobrious or offensive language should be used by the boarding officers towards the Neutrals' ship, Country, Flag etc." [8] A renewal of this protest early in August elicited the revised instructions issued by the Navy Department on August 18, 1862, which did much to lessen friction with neutrals. The second of these forbade American cruisers to chase and fire at a foreign vessel without showing their colors and giving her the customary preliminary notice of a desire to speak and visit her.[9]

The treatment of neutral mail steamers and mails raised problems of lasting importance. On November 9, 1861, the day after the seizure of Mason and Slidell, but eighteen days prior to the arrival of the news of their capture, Hammond, the Under-Secretary of State for Foreign Affairs asked the Law Officers to state "to what extent, under the Law of Nations," a United States warship seeking "to intercept the West-Indian mail steamer, with a view of getting possession of the persons of Messrs. Mason and Slidell, or of their credentials or instructions . . . would be entitled to interfere with the mail-steamer if fallen in with beyond the territorial limits of the United Kingdom, that is, beyond three miles from the British coast." Three days later the Law Officers reported

> that the United States' man-of-war falling in with the British mail-steamer beyond the territorial limits of the United Kingdom might cause her to bring-to, might board her, examine her papers, open the general mail-bags, and examine the contents thereof, without, however, opening any bag or packet addressed to any officer or Department of Her Majesty's Government.
>
> The United States' ship of war may put a prize-crew on board the West India steamer, and carry her off to a port of the United States for adjudication by a Prize Court there; but she would have no right to remove Messrs. Mason and Slidell, and carry them off as prisoners, leaving the ship to pursue her voyage.

[6] Adm. 1/5871. P. 132. Milne's memoranda of March 15, 1864, for his successor, Admiral Sir James Hope. The capital "P" in this and other citations does not stand for "page" but for the words "North America and West Indies station" in the Admiralty key. Letters to and from the Secretary to the Admiralty will be cited as "to Admiralty" and "Admiralty to Milne" *et al.*

[7] In the present article, the material is arranged topically, in the order in which the subjects dealt with are treated in Moore's Digest of International Law.

[8] Adm. 1/5787. P. 355.

[9] Parliamentary Papers, 1863, Vol. LXXII, North America, No. 5, pp. 1–4. Official Records of the Union and Confederate Navies, Series I, Vol. I, pp. 417–418. Hereafter cited as O. R. N.

> On the assumption that the West India packet is liable to capture and confiscation, on the ground of carrying enemies' despatches, the cruizer would, in strictness, be entitled to carry her, and all and everything in her, to America. She might, however, and, in our opinion, ought, under the circumstances, to put on shore at some convenient port passengers and their baggage, not being contraband of war.
>
> We cannot say that any of Her Majesty's ships of war would be justified in preventing the United States' man-of-war from interfering with the West India mail-steamer on the high seas. The case is not one of such a character as to justify resistance by force *in limine*, even assuming that the condemnation of the vessel would not be justified. The questions, whether any of the documents on board the mail-vessel are despatches contraband of war; and, if so, whether they are protected either by the nature of the conveyance, or by the character of the persons to whom they are addressed, or otherwise, are all questions which may admit of doubt and controversy, and do not appear to us to be concluded by authority;* but we think that the decision of them, in the first instance at all events, belongs to the Prize Court of the captors.[10]

When consulted after the arrival of the news of the seizure of Mason and Slidell, the Law Officers reported on November 28th that Wilkes's action

> was illegal and unjustifiable by international law.
>
> The "San Jacinto" assumed to act as a belligerent, but the "Trent" was not captured or carried into a port of the United States for adjudication as prize, and, under the circumstances, cannot be considered as having acted in breach of international law.
>
> It follows, that from on board a merchant-ship of a neutral Power, pursuing a lawful and innocent voyage, certain individuals have been taken by force. They were not, apparently, officers in the military or naval service of the Confederate Government.
>
> It does not appear that any papers whatever were demanded or taken by the captors, nor upon what charge or imputed offence, if any, the delivery of the prisoners was enforced. Her Majesty's Government will, therefore, in our opinion, be justified in requiring reparation for the international wrong which has been on this occasion committed.[11]

Seward, as is well known, based the release of Mason and Slidell on the ground that "Captain Wilkes after capturing the contraband persons and making prize of the 'Trent,' in what seems to us a perfectly lawful manner,

[10] The asterisk in the original refers to the following footnote: "See 'The Atalanta,' 6 C Robinson's Admiralty Reports, 440; 'The Caroline,' *ibid.*, 461; Hautefeuille, 'Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime,' vol. ii, pp. 462, 470; Wheaton's 'Elements,' sixth edition, p. 567 (Note A)."

The opinions of Nov. 12th and 28th are printed in full in the document section of the American Historical Review for October, 1928, from photostats of the copies printed for the use of the Cabinet, Nov. 28 and 29, 1861, preserved in Adm. 1/5768.

[11] *Cf.* North America, No. 5 (1862), pp. 2–3. Russell to Lyons, Nov. 30, 1861. A comparison of the opinions of Nov. 12th and 28th shows that the Law Officers did not change their opinion as to the legality of the removal of Mason and Slidell without capturing the *Trent*, after the arrival of the news, as has been alleged by various writers on the strength of a letter from Palmerston to Delane, Nov. 11, first published in Dasent's Life of Delane in 1908. See the writer's article in the American Historical Review for October, 1928.

instead of sending her into port, released her from the capture." . . .[12] Were neutral mail steamers then to remain subject to capture for the incidental transport of belligerent diplomats and despatches? Anticipating the arrival of Federal and Confederate warships in the waters near the British Isles, Earl Russell suggested to the Admiralty on January 13, 1862, that regular cruising in the English and St. George's Channels should be organized, to ensure respect for the rights of British commerce. "At the same time stringent orders must be given to the Commanders of our Cruizers to do nothing which the Law Officers would deem illegal. This is more especially necessary as we have lately been obliged to ask from the Govt. of the U. S. reparation for a breach of International Law in regard to a British Vessel." He therefore suggested that the Admiralty take the Law Officers' opinions of November 12th and 28th as a guide in drawing up the required instructions.[13]

On the completion of their draft, the Lords of the Admiralty raised grave objections. The first instruction, which forbade belligerents to interfere in any way with any vessel within three miles of the British coast, seemed to them correct. The second and third instructions provided that

> beyond those limits H. M. Ships would not be justified in preventing a Vessel of War of either of the belligerent States from interfering with a British Merchant Vessel or Packet, and that such belligerent vessel of War might cause a British Merchant Vessel or Packet to bring to, might board her, examine her Papers, open the General Mail Bags and examine the Contents thereof; without however opening any Bag or Packet addressed to any Officer or Department of H. M. Govt.
>
> 3rd That the belligerent Vessel may put a Prize Crew on board any British Vessel and carry her off to an American Port for adjudication by a Prize Court there, but has no right to remove any Persons on board, leaving the Merchant Ship to pursue her voyage.[14]

In opposition to these provisions, the Lords of the Admiralty argued that

> it is not in accordance with Admiralty Law that a cruizer of a Foreign State, even after a declaration of War, should do more than exercise a right of visit to ascertain the nationality and destination of the vessel arrested, and that, when it is ascertained that she is a Merchant Ship of a neutral power proceeding from one neutral Port to another, no ground of detention or capture can arise.
>
> My Lords consider that the case of a Packet carrying the mails for H. M.'s Govt is even stronger, and that, the nationality and destination being in this case undoubted, no Mail Bag or Packet however addressed should be opened, and that no question of contraband can arise in the case of a Vessel proceeding from one neutral Port to another neutral Port.

The Admiralty therefore proposed to instruct their cruisers that

> in case one of the Packets carrying H. M.'s mails between one Neutral Port and another should, after her nationality and destination shall

[12] North America, No. 5 (1862), p. 23. [13] Adm. 1/5798.

[14] Adm. 1/5798. Romaine to Hammond, Jan. 16th, with draft of letter to Port Admirals.

> have been ascertained, be further detained or captured with a view to adjudication in an American Court, such detention or capture should not be permitted, and in case of a British Cruizer being present when such a Mail Packet was visited by a Cruizer of the United or Confederate States no further interference with her should be allowed than would be necessary to ascertain her nationality and destination.

The fourth instruction of the Admiralty draft provided

> that on the assumption that the British Merchant Vessel or Packet is liable to capture on the ground of carrying enemies' despatches, the belligerent Vessel of War would in strictness be entitled to carry her and all and everything in her to America, but might and ought to land Passengers and Baggage not contraband of war, at some convenient Port.

This, the Lords of the Admiralty objected,

> cannot be allowed; unless it is intended that all intercourse is to cease between the U. S. and Great Britain. For, if it is held that the Northern States may take to New York for adjudication any Packet carrying despatches of the enemy, or Rebels, or contraband of War, between the West Indies and Great Britain, then a fortiori may the 'Sumpter,' or any Cruizer of the Southern States, open the Mail Bags and capture the Packets of the Cunard Line, carrying Despatches and Enemies of their Country engaged in negotiations and purchases of Arms etc. and found on board these Vessels, which regularly proceed not from one neutral Port to another but from the Neutral Ports of Great Britain and her colonies to the Enemies' Ports of Boston and New York . . . if rights so wide and so far beyond all precedent are now allowed, the correspondence of this Country with the United States may be greatly jeopardised, and her correspondence and commerce with the Ports of her own Colonies and with neutral Ports in every part of the World be subject to great and unnecessary risks and disorders.

In view of these serious objections, Russell agreed to withdraw the correspondence concerning the proposed instructions and let the matter stand over.[15] In his long despatch of January 23rd to Lord Lyons, replying to Seward's arguments of December 26th, he declared that the British Government "would not acquiesce in the capture of any British merchant-ship in circumstances similar to those of the 'Trent,' and that the fact of its being brought before a Prize Court, though it would alter the character, would not diminish the gravity, of the offence against the law of nations which would thereby be committed." [16]

The Admiralty promptly abandoned the idea of using force to prevent detention or capture of British mail packets on the high seas between two neutral ports. On January 18, 1862, Milne was instructed not to "interfere

[15] Adm. 1/5798. Hammond to Romaine, Jan. 17th. Private.

[16] North America, No. 5 (1862), p. 37. *Cf.* Selborne, Memorials, Part I, Vol. II, pp. 392–394; Massachusetts Historical Society Proceedings, Vol. XLV, pp. 137–138. Argyll to Adams, Jan. 25, 1862.

with any belligerent operations which may be carried on by either party beyond the limit of 3 miles from the Shore of any British possession although those operations might be attended with annoyance and inconvenience to the trade of British Ports." [17] In the following December, however, roused by a false rumor that Admiral Wilkes had expressed the intention of capturing the English packet from St. Thomas to Halifax in case he found certain Confederate officers on board her, Milne ordered the senior officer at Bermuda to use force, if necessary, to recapture the mail steamer.[18] After consulting the Foreign Office, the Admiralty directed Milne to revoke this order, on the ground that "although the seizure of the Packet would be an extreme use of Belligerent Rights and would justify the British Government in demanding reparation from the Federal Government, yet it would not justify an Officer in the use of Force to resist the capture or to recapture the Packet in the open Sea." . . . They observed that "it is important that Her Majesty's Officers should act strictly within the Law even where Officers of the Federal Govt. misapply the powers of the Law." [19] When Lyons complained to Seward of the alleged threat, Secretary Welles promptly ordered Wilkes not to carry it out.[20]

Meanwhile the British Government had obtained satisfactory assurances as to the treatment of neutral mails. The instructions issued to Federal cruisers on August 18, 1862, provided that

> to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried, or parcels under official seals, you will, in the words of the law, "preserve all the papers and writings found on board and transmit the whole of the originals unmutilated to the judge of the district to which such prize is ordered to proceed"; but official seals, or locks, or fastenings of foreign authorities, are in no case, nor on any pretext, to be broken, or parcels covered by them read by any naval authorities, but all bags or other things covering such parcels, and duly seized and fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel will be remitted to the prize court, or to the Secretary of State at Washington, or such sealed bag or parcels may be at once forwarded to this Department, to the end that the proper authorities of the foreign government may receive the same without delay.[21]

[17] Adm. 13/31. No. 47 M.

[18] Adm. 1/5788. P. 867. Milne to Captain Glasse, Dec. 5, 1862. Confidential. Copy transmitted by Milne to Admiralty, Dec. 27. No. 996.

[19] Adm. 1/5832. Feb. 2, 1863.

[20] Papers Relating to Foreign Affairs, 1863, Part I, pp. 465–467. Wilkes denied the report. *Ibid.*, p. 502.

[21] O. R. N., Series I, Vol. I, p. 418. *Cf.* Diary of Gideon Welles, Vol. I, pp. 74, 79–80, 82, 181.

Dissatisfied with the scope of this concession, Russell instructed Stuart, the British chargé at Washington, to ascertain from Seward

> whether the Government of the United States admits the principle that Her Majesty's mail-bags shall neither be searched nor detained. . . . Her Majesty's Government cannot doubt that the Government of the United States are prepared to concede that all mail-bags, clearly certified to be such, shall be exempt from seizure or visitation, and that some arrangement shall be made for immediately forwarding such bags to their destination in the event of the ship which carries them being detained. If this is done, the necessity for discussing the claim, as a matter of strict right, that Her Majesty's mails, on board a private vessel, should be exempted from visitation or detention, might be avoided.[22]

Stuart reported that Seward "showed great readiness to admit the principle for which Her Majesty's Government would otherwise have been prepared to contend, with respect to mail-bags clearly certified to be such." [23] In reply to a private and unofficial note from Stuart, Seward sent him a copy of the following letter which he had addressed to Welles on October 31, 1862:

> It is thought expedient that instructions be given to the blockading and naval officers that, in case of capture of merchant-vessels suspected or found to be vessels of the insurgents or contraband, the public mails of any friendly or neutral Power, duly certified and authenticated as such, shall not be searched or opened, but be put, as speedily as may be convenient, on their way to their designated destinations. This instruction, however, will not be deemed to protect simulated mail-bags, verified by forged certificates or counterfeited seals.[24]

As Welles chose to regard Seward's letter of October 31 as "only a passing suggestion," he refrained from issuing instructions which seemed to him "so manifestly in conflict with all usage and practice, and the law itself, and so detrimental to the legal rights of captors, who would thereby be frequently deprived of the best, if not the only evidence that would insure condemnation of the captured vessel." [25] When Lord Lyons, in April, 1863, asked that the mails captured on the *Peterhoff* should be forwarded to their destination in accord with Seward's pledge of October 31,[26] Welles hotly protested.[27] Finding his Secretaries of State and the Navy deadlocked on the issue, President Lincoln directed them both on April 21st to submit arguments for his decision.[28] Welles sent him a long statement buttressed with references to

[22] North America, No. 10 (1863). Russell to Stuart, Oct. 10, 1862.

[23] North America, No. 5 (1863), p. 5. [24] North America, No. 5 (1863), pp. 5–6.

[25] Welles, *Lincoln and Seward*, pp. 92–94. Welles to Seward, April 13, 1863.

[26] Papers Relating to Foreign Affairs, 1863, I, pp. 496–497, 505–506.

[27] Welles, *Lincoln and Seward*, 85–122. See especially Welles to Seward, April 13 and 18. See also Moore, *Digest*, Vol. VII, pp. 481–484. Seward to Welles, April 15 and 20. Navy Department, Executive Letters, April, 1863. Seward to Welles, April 11, 14 and 18. Navy Department, Executive Letter Book No. 16. Welles to Seward, April 27, 1863. Diary of Gideon Welles, Vol. I, pp. 180–181, 266–267, 269–272, 273–276, 277–287, 288–290, 299–301, 302–304, 306, 310, 315, 335.

[28] Welles, *Lincoln and Seward*, p. 99.

British and American practice;[29] Seward, a report far stronger in arguments from policy than in precedents:

> . . . No decision of an English Court of Admirality can be found, bearing upon mails, or even letters, carried in neutral vessels in time of war.[30]
>
> It has been decided by the Supreme Court of the United States in the cases of the Dos Hermanos, 2d Wheaton, page 76, and the Pizarro, 2d Wheaton, page 227, 4th Wheaton, page 91, and the Amiable Isabella, 6th Wheaton, page 1.
>
> First. That it is the duty of the captors to bring the ships papers into the registry of the district court, and verify them on oath.
>
> Secondly. That it is exclusively on such papers, and the examinations of the officers and seamen, that the case is to be heard in the first instance.
>
> What constitute the papers of a Ship? They are, first, those relating to her nationality. And, secondly, those relating to her cargo. The nationality of a Ship is determined, 1. By her Register; 2d By her passport; 3d Her clearance, perhaps, in part, which also is proof in the first instance, at least, of her destination.
>
> The papers relating to her cargo are the manifest, invoices, bills of lading, and correspondence on board, principally, perhaps, letters from consignors to consignees.
>
> Hautefeuille, a principal French writer on public law, contends that a belligerent has only a right to satisfy himself as to the nationality of a neutral which may be on a voyage from one neutral port to another. He has no right to examine the papers relative to the cargo, which can only be done when the voyage is from a neutral to a belligerent port.
>
> No case can be found in which question as to the inviolability of a mail of a neutral power on board a vessel of that power on a voyage between two neutral ports, has been considered or decided. This may be because it was not until some time after the last general European peace, that the practice originated of placing regular mails on board of vessels bound to foreign ports. This practice began with transient vessels; and having been continued when regular lines of sailing packets were established, of late years has culminated with the existing lines of steamers, which traverse the seas in various directions.

After referring to the case of the *Adela* [31] as the only one during the present

[29] Welles, *Lincoln and Seward*, pp. 100–115. April 25, 1863.

[30] Welles, however, cited *The Two Brothers* (1 C. Rob. 131); *The Romeo* (6 C. Rob. 351); *The Atalanta* (6 C. Rob. 440); and *The Caroline* (6 C. Rob. 461). *Lincoln and Seward*, pp. 102–103.

[31] The public mails of this vessel, captured on a voyage from Liverpool by the way of Bermuda to Nassau, had been committed to the custody of the prize court at Key West. Seward stated that "it was subsequently reported to the Department by the United States Consul at Leeds, in England that there was reason to believe a vessel answering her description had taken mails for the purpose of screening her true destination or the character of her cargo, and that the custodian of the papers at Key West had been bribed to deliver up such of them as would be likely to lead to her condemnation." Commodore Lardner, commanding the Eastern Gulf Squadron, reported to Welles that "Great exertions were made by the British authorities in the West Indies to obtain the mails found in the *Adela*. Two ships of

war, prior to the capture of the *Peterhoff*, which raised the question of the inviolability of public mails, Seward closed with a strong argument on grounds of policy. In most European wars the United States would remain neutral. It was "obvious that any belligerent claim which we make during the existing war, will be urged against us as an unanswerable precedent when we may ourselves be at peace." [32]

On the basis of precedents laid down by Lord Stowell, Welles might well feel that he had the stronger case. Bates, Blair, Chase and Sumner agreed with him.[33] Seward's arguments from policy, however, carried the day. Alarmed lest friction with England over neutral mails might lead to war, the President refused to abandon his support of Seward's policy.[34] With the approval of the President, Seward had already [35] directed the District Attorney at New York to apply for leave to withdraw the mail bag from the custody of the prize court. When that official made affidavit "that the mail appeared to be a *bona fide*, authenticated, sealed, public government mail of Great Britain, found on board of a commercial vessel, apparently navigated between London, in England, and Matamoras, in Mexico; . . . and that he, as attorney for the United States and the captors, under his general authority as district attorney, and under special authority from the government, consented that said mail be given up, to be sent to its destination," Judge Betts ordered that the mail bag be delivered to him "to be by him disposed of conformably to the instructions of the government of the United States." [36]

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war, the *Rinaldo* and *Petrel* [*Peterel*], were sent to Key West for that purpose. Their commanders were not satisfied with an intimation that they might be delivered to them, with the exception of such papers as related to the ship and cargo. During the night subsequent to an examination of the captain and officers by the prize commissioner, the United States courthouse at Key West was entered by the captain of the *Adela*, and the mail in question abstracted (in an unbroken parcel) and destroyed by him. O. R. N., Series I, Vol. XVII, pp. 277–286 at p. 279. Admiral Milne censured Commander Watson of the *Peterel* for the objectionable tone he adopted towards Lardner and other United States officials at Key West, and considered that "he, at least, acted very indiscreetly in receiving the Mail bag in such an underhand way as he describes, instead of receiving it openly or not at all." Adm. 1/5787. P. 570. Milne to Admiralty, Aug. 14, 1862. Watson's report of his proceedings was not found by the writer. The mail bags were supposed to contain despatches from Milne to *H. M. S. Greyhound* at Nassau. See also North America, No. 5 (1863), pp. 1–5; Papers Relating to Foreign Affairs, 1862, I, p. 183; 1863, I, pp. 530, 531, 550, 552, 562; Foreign Relations, 1873, III, 128–129.

[32] State Department, Report Book No. 8, pp. 358–361. Seward to Lincoln, April 24, 1861. The latter portion of this report is printed in the document section of the American Historical Review for October, 1928.

[33] Diary of Gideon Welles, Vol. I, pp. 274–275, 285–289, 290, 301, 304.

[34] *Ibid.*, pp. 286–287.

[35] Papers Relating to Foreign Affairs, 1863, I, p. 510.

[36] *The Steamer Peterhoff and Cargo*, Blatchford's Prize Cases, pp. 463–550, at p. 468. Francis H. Upton, counsel for the captors, wrote to Sumner on April 27: "I was no less astonished and mortified than yourself at the course of the Dist. Atty. and its results, in the matter of the mail of the 'Peterhoff.' . . . I cannot but feel with you that the concession

On May 21st Seward transmitted to Welles the President's orders to instruct the commanders of blockading squadrons that "public mails found on board of vessels captured for a breach of the blockade . . . until notice should be given after further experience, . . . would not be opened, but would be forwarded to their destination." [37] The Secretary of State had succeeded in committing his government to the rôle of "the pioneer" [38] in granting immunity to neutral mails.

While neutral, Great Britain consistently maintained its traditional opposition to the neutral claim of convoy.[39] When *H. M. S. Ariadne* convoyed the English steamer *Ruby*, which had been employed as a blockade runner, Milne at once forbade the practice.[40] In August, 1863, he issued instructions that "as convoy does not render the neutral convoyed less amenable to all the belligerent rights of visit, search, detention, or capture, no advantage at all commensurate with the risk of possible collision would follow, if afforded, and therefore all requests for convoy by Her Majesty's ships are to be refused.[41]

The zeal of American naval officers in pursuit of prizes raised numerous questions as to alleged captures within neutral territorial waters.[42] In dis-

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under such circumstances, urged and made in the manner which it was, was a wound to the national honor, which even a final condemnation cannot fully heal." Sumner MSS. in Harvard College Library, Vol. LXIV.

[37] Moore, Digest, Vol. VII, pp. 483–484. *Cf.* Papers Relating to Foreign Affairs, 1863, I, p. 221. Seward to Adams, April 21, 1863.

[38] T. J. Lawrence, War and Neutrality in the Far East, 2d ed., London, 1904, p. 189. For discussions in Parliament as to the mails of the *Peterhoff* see Hansard, 3rd Series, Vol. CLXX, pp. 560–572, 653–658, 763–767, 980–981, 995, 1153–1154. *Cf.* Selborne, Memorials, Part I, Vol. II, pp. 394–399. For the controversy during the World War, see American White Book, No. 3, pp. 145–156; No. 4, pp. 53–59.

[39] *Cf.* Moore, Digest, Vol. VII, pp. 491–493; Naval War College. International Law Situations, 1911, pp. 37–50; Colombos, Law of Prize, pp. 256–258.

[40] Adm. 1/5819. P. 312. Milne to Admiralty, May 23, 1863, enclosing copy of Milne to Commodore Cracroft, May 21. The admiral cited Lord Stowell's decision in the case of *The Maria* (1 C. Rob. 340), from Hazlitt and Roche, Manual of the Law of Maritime Warfare, London, 1854, p. 275. Milne expressed similar views to Crawford, the British Acting Consul General in Cuba, pointing out that "a fair trader ought not to require" convoy, "while the fraudulent trader can have no claim to it at our hands." Adm. 1/5819. P. 312. *Cf.* O. R. N., Series I, Vol. II, p. 147; and Hansard, 3rd Series, Vol. CLXXI, pp. 874–878.

[41] Adm. 1/5872. P. 269. Milne wrote to Lyons on May 23rd that "in the present state of our Relations with the United States, it would be highly undesirable to provoke by any act on our part, a discussion on so controverted a question of international law as that of the right of convoy by neutrals." Copy in Adm. 1/5819. P. 312. Milne's views on convoy were approved by Lyons, by the Admiralty, and by the Foreign Office. Adm. 1/5851. Foreign Office letter of June 30, 1863, with copy of Lyons to Russell, June 12, 1863. *Cf.* Adm. 12/733. Digest entries of Admiralty minute of Aug. 3, 1863, and of Foreign Office letter of Aug. 8, 1863. See also Adm. 1/5871. P. 132. Milne's memoranda for Sir James Hope, March 15, 1864.

[42] Papers Relating to Foreign Affairs, 1862, I, p. 229; 1863, I, pp. 418–419, 432–433, 435–436, 444, 445, 446, 453, 454–455, 456, 462–463, 522, 528, 543, 546–548, 549–550, 565, 581,

cussing British neutral rights and duties, Admiral Milne, the Law Officers of the Crown, the Admiralty and the Foreign Office invariably assumed a three-mile limit of British jurisdiction. In Hammond's letter to the Law Officers, November 9, 1861, occurs the phrase, already quoted, "beyond the territorial limits of the United Kingdom, that is, beyond three miles from the British coast." [43] The Admiralty took the same view concerning the projected instructions for British cruisers in January, 1862, stipulating "That *no Vessel* can be interfered with in any way by a Man of War of either belligerent Party while within the territorial limits of the United Kingdom, that is within three miles of the British Coast." [44] The Law Officers' opinion of October 19, 1863, concerning the *Tuscaloosa*, stated that the capture of the *Sea Bride* took place "beyond the distance of three miles from the shore, and as we have already had the honour to report to Y. Ldp., that distance must be accepted as the limit of territorial jurisdiction according to the present rule of international law upon that subject." [45] When Commander Hickley of the *Greyhound* interfered with the exercise of the belligerent right of search which *U. S. S. Adirondack* was attempting to exercise more than five and a half miles from shore, Milne censured him, and

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598–603, 611–614, 617–618, 624–626, 632; 1864, II, pp. 390, 411, 452. Diary of Gideon Welles, Vol. I, pp. 416–427, 458, 461. North America, No. 5 (1863), pp. 1–4. *Cf. The Sir William Peel* (5 Wall. 517); and *The Adela* (6 Wall. 266). When the case of the latter vessel came before the American-British Claims Commission, "The counsel for the United States urged that the doctrine of the sovereignty of the proprietary nation over the sea for a marine league from the shore is founded in the idea of a proper and necessary protection to the adjacent coasts, and to the vessels resorting to them for legitimate trade. That in its original inception this doctrine never included the idea that a vessel engaged in an unlawful voyage might protect herself from capture, to which she would be subject on the high seas, by merely skirting the coast of a harborless and substantially uninhabited island, such as the island of Abaco. That although strictly and technically the coast of such an island might be within the protection of the rule, it was only technically so; and that where a claim is set up for the protection of a vessel actually engaged in an unlawful voyage, and claiming a capture otherwise lawful to be made unlawful by reason of being within a marine league of the shore of such an island, a judicial tribunal should require strict and conclusive proof to bring the vessel within the technical rule, and to satisfy them that the neutrality of the proprietary nation had been in fact violated. That the burden of proof, therefore, devolved strictly and onerously upon the claimants; and that on the evidence appearing in this case it would be unjust to resolve any doubts which the commission might have in this regard in favor of the claimants." The claim was unanimously disallowed. Foreign Relations, 1873, III, pp. 128–129. See also North America, No. 2 (1874), pp. 107–113.

[43] Adm. 1/5768. Quoted in the Law Officers' opinion of Nov. 12, 1861.

[44] Adm. 1/5798. Draft of letter to Port Admirals, enclosed in Romaine to Hammond, Jan. 16, 1862.

[45] Adm. 1/5852. Copy enclosed in Hammond to Admiralty, Oct. 30, Nov. 4, 1863. *Cf.* North America, No. 6 (1864), p. 18. Newcastle to Wodehouse, Nov. 4, 1863. See also Appendix to British Case, Geneva Arbitration, Vol. II, p. 54. Law Officers to Russell, Jan. 5, 1863. On Jan. 14, 1863, Russell observed to Lyons that "the high seas must be considered as beginning at the distance of 3 miles from the shore." Adm. 1/5850. Copy enclosed in Hammond to Admiralty, Jan. 24, 1863.

issued a circular warning his officers against the erroneous impression, then prevalent at Nassau, that improved gunnery, by extending the range of shot, had extended territorial limits beyond the recognized marine league. With this, he transmitted extracts from instructions issued by the Admiralty on January 18, 1862: "No warlike operations are to be permitted in British waters, that is, within three miles of the shore of any British possession. Should such operations be attempted within a British harbour, or within the undoubted limits of British territory, they should be prevented, and, if necessary, force is to be used for that purpose." [46] The Law Officers reported that "As regards the distance from the Shore to which the jurisdiction of the adjacent territory extends we are of opinion that whatever may have been the theory on which the distance of a marine League was adopted, and notwithstanding the greatly increased range of artillery at the present day, the old rule is still in force, and must be adhered to." [47]

In October, 1862, Milne raised the question as to whether British territorial waters extended three marine miles from the northern reefs at Bermuda, which were themselves eight and one-half miles from the shore of the island. He considered the reefs as a part of Bermuda, but had some doubts in view of a despatch written by Palmerston on July 12, 1849, concerning the cays of Cuba.[48] The Law Officers reported that "the authority (the *dominium eminens*) of Her Majesty does extend to three marine miles from the Northern Reefs. We think that these Reefs must be considered as belonging to the territorial jurisdiction incident to the possession of Bermuda, so far, at least, as that between them and the Island H. M. has a right to prevent the exercise of Hostilities; and that if we are right in considering them as part of Bermuda, it would follow that H. M.'s jurisdiction must extend for three marine miles from that point." [49] On receiving a copy of this opinion from the Foreign Office, the Admiralty replied that, before sending Milne orders on the subject which might "lead to collision with the U. S.," they wished to make sure that the Law Officers had considered Palmerston's despatch, which seemed "completely in point." In 1849 "a claim on behalf of the Spanish Crown to territorial jurisdiction to three miles beyond the

[46] Adm. 1/5788. P. 624. Milne to Admiralty, Aug. 14, 1862, enclosing copy of Milne to Hickley, Aug. 8. Adm. 13/31. No. 47 M. Romaine to Milne, Jan. 18, 1862. Adm. 1/5872. P. 269. Milne to Senior Naval Officer, Nassau, Aug. 8, 1862, circulated Oct. 13, 1862.

[47] Adm. 1/5799. Quoted in Hammond to Admiralty, Oct. 10, 1862.

For a summary of the decisions of British courts on this subject in the middle of the nineteenth century, see the important article of Dr. Thomas Baty on "The Three-Mile Limit," in this JOURNAL, Vol. XXII, pp. 503, 521–522, 524.

[48] Adm. 1/5788. P. 731. Milne to Admiralty, Oct. 16, 1862. Welles wished to challenge British jurisdiction over such "uninhabited, barren spots" as Sand Key. Diary, Vol. I, pp. 416–427. See, however, Papers Relating to Foreign Affairs, 1863, I, p. 435.

[49] Adm. 1/5799. Law Officers to Russell, Oct. 31, 1862. Copy enclosed in Hammond to Admiralty, Nov. 1st.

uninhabited rocks and keys on the coast of Cuba . . . was denied by H. M. Govt. and the Admiralty directed to resist such claim if insisted on." [50]

The Law Officers, however, were "still of opinion that the territorial jurisdiction of Bermuda must be estimated at the distance of a marine league from the North Rock or the outer ledge of the coral reefs; or at all events from the rock, and the outer ledge of that part of the coral reef which is not covered by the sea at low water." Pointing out that the United States had claimed the Florida reefs, the Law Officers cited at length Lord Stowell's opinion in the case of *The Anna* (5 C. Rob. 373). Palmerston's letter of September 8, 1848, "certainly propounded the novel principle 'that the uninhabited cays of the coast of Cuba cannot be considered invested with territorial Jurisdiction beyond low water mark.'" Two opinions of Sir John Dodson "seem to turn upon the uncertainty attaching to the dominion over these rocks and do not necessarily touch the question whether, if the Sovereignty of Spain over these Islands were established such Sovereignty would not have carried with it the maritime rights in controversy." The Foreign Office, however, which seems to have understood Sir John Dodson's second report of December 30, 1848, as sanctioning Palmerston's views, issued instructions based thereon to Consul Crawford, July 24, 1849. July 30, 1850, Lord Eddisbury, Undersecretary for Foreign Affairs, directed Acting Consul General Kennedy, at Havana, to acknowledge Spain's sovereignty over the cays, "'but H. M.'s Government to not admit that the right of sovereignty over barren and uninhabited rocks and islets can carry with it territorial jurisdiction over the surrounding seas.'" A report of the late Queen's Advocate, Sir John Harding, on November 11, 1859, "returns to the original position of Sir J. Dodson as to the uncertainty of the Spanish title to the cays themselves. Indeed he expressly says: If the Spanish title 'shd be clearly established in one or more particular cases, *then I consider that the 3 mile limit applies to such cases, just as it would to the coast of Cuba.*'" In conclusion, the Law Officers remarked that Dodson, when he made his second report on Palmerston's letter, must have overlooked "the very strong precedent of the 'Anna.'" [51]

[50] Adm. 1/5799. Separate minute dated Nov. 10, 1862, with letter of Hammond to Admiralty, Nov. 7, 1862.

[51] Adm. 1/5799. Law Officers to Russell, Dec. 3, 1862. Copy enclosed in Hammond to Admiralty, Dec. 11th.

For the American objections to Spain's claim of a six-mile limit surrounding Cuba, see Moore, Digest, Vol. I, pp. 706–714; Papers Relating to Foreign Affairs, 1862, II, p. 523; 1863, II, pp. 904, 905; 1864, IV, pp. 1–4, 5, 9, 28, 29, 87; 1875, I, pp. 641–642, 649–650; 1880, pp. 922–927, 929–930; 1881, pp. 1044–1047, 1049–1054; 1895, *s.v.*, *Aliança*; Welles, *Lincoln and Seward*, pp. 167–173, and Diary, Vol. I, pp. 170, 367–368, 399–400, 467–468.

When Sumner published his article on the "Case of the Florida: Illustrated by Precedents of British Seizures in Neutral Waters," in the Boston Daily Advertiser, Nov. 29, 1864, the British Foreign Office asked the Admiralty to have a memorandum drawn up "showing how far these instances are correctly represented." In transmitting the information requested concerning British seizures in neutral waters, the Lords of the Admiralty observed that they

The case of the Confederate blockade-runner *Margaret and Jessie*, which was fired at by the *U. S. S. Rhode Island* off the island of Eleuthera on May 30, 1863, demonstrated the greatly increased range attained by rifled guns.[52] The fact that projectiles fired from the *Rhode Island* struck the shore, though the cruiser did not approach within four miles of the land, led Burnley, the British chargé at Washington, to point out "the bearing on the territory limits of three miles beyond the sea-shore which the more powerful artillery now constructed may involve." He was directed by the British Government to express "their hope that the United States government will concur with them in opinion that vessels should not fire towards a neutral shore at a less distance than that which would insure shot not falling in neutral waters or on neutral territory." [53] Seward replied that the British proposal would be "brought to the attention of other maritime powers, in order that if any change shall be made it may be general"; but he criticized the British suggestions as "expressed in too general terms to be made the basis of a discussion." [54] Dr. Baty assumes that the British Government proposed an extension of the jurisdiction of the littoral state by convention to five miles.[55] It is not clear, however, that the Foreign Office intended to do more than to elicit instructions to American warships not to fire shot or shell that would fall in neutral waters or on neutral territory.[56] In any event the proposal promptly dropped out of sight.

Alarmed by a rumor that Captain Semmes had threatened to destroy British vessels found carrying arms to the United States, William Inman, of the Liverpool, New York and Philadelphia Steamship Company, asked the Foreign Office whether the *Alabama* would be allowed to destroy British steamers without carrying them into a prize court for adjudication. Hammond replied that "it would be contrary to the usual practice of this office to state beforehand what course Her Majesty's Government would think

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saw "no reason to doubt that the cases with some exceptions are correctly stated . . . and they have only to observe that altho' neutral rights and territory were undoubtedly violated in several instances they do not find any parallel case to that of the 'Florida' since that vessel had undoubtedly claimed the protection of an independent neutral power, and was captured in direct violation of the Engagement entered into by the U. States Consul that the neutrality of the Port would be respected." Adm. 1/5903. Hammond to Admiralty, Dec. 20, 1864. Separate minute, Jan. 3, 1865. Memorandum of Dec. 31, 1864, signed Thos. Wolley. Works of Charles Sumner, Vol. IX, pp. 141–173. For the seizure of the *Florida* at Bahia by *U. S. S. Wachusett* see O. R. N., Series I, Vol. III, pp. 255–294, 631–646; Papers Relating to Foreign Affairs, 1864, II, p. 349; III, pp. 172, 197; IV, pp. 321–324; 1865, III, pp. 151–152; 1866, II, pp. 301–302, 305, 307–309, 317–318.

[52] Papers Relating to Foreign Affairs, 1863, I, pp. 581, 624, 625, 626; 1864, I, pp. 779, 784, 787–800, 811–816; II, pp. 412–450, 494–496, 563–564, 575–576, 639.

[53] *Ibid.*, 1864, II, pp. 704–705. Burnley to Seward, Sept. 10, 1864.

[54] *Ibid.*, pp. 706, 708–709. Seward to Burnley, Sept. 15 and 16, 1864.

[55] This JOURNAL, Vol. XXII, p. 522.

[56] *Cf.* the French objections to the *Kearsarge* engaging the *Alabama* close to the three-mile limit. Papers Relating to Foreign Affairs, 1864, III, pp. 104–105, 120–121.

right to adopt under circumstances which may never occur." [57] Two days later, however, Earl Russell instructed both the British chargé at Washington and the British acting consul at Richmond that

> The captor of a vessel seizes her on a fair suspicion that the neutral is *pro hac vice* aiding the enemy of the Captor, for instance by carrying contraband of war.
>
> The Government of the neutral submits to the exercise of this authority, the creature of the war on the faith that the Conduct and property of its subject or citizen will be submitted to the impartial jurisdiction of a legal tribunal, bound to regulate its procedure and its decisions according to recognised principles not of municipal but of international law.
>
> Every belligerent is obliged to have such tribunals so constituted and conducted, and a belligerent which carried on war without them would be rightly considered and treated as piratical by States not otherwise concerned in the war.
>
> It is not the act of the captor but the decree of the Prize Court that constitutes the Prize a good one, that permanently changes the property of the vessel or goods seized, and gives to a new owner a new judicial title, a title universally respected by foreign States because it is judicial.
>
> It is obvious therefore that for a belligerent to be without a Court of Prize and to capture vessels without ever resorting to such a tribunal are practically equal violations of neutral rights and international law.
>
> Various well established legal consequences flowing from this doctrine illustrate it.
>
> Those captors who after capture misconduct themselves towards the captured vessel or crew; or who carry the Prize for adjudication unnecessarily to an inconvenient Port have been mulcted in demurrage costs and damage according to the exigency of the case.
>
> Still further, the Captor has been holden bound to make full restitution to the owners of a captured vessel, wantonly and unnecessarily destroyed.
>
> The law as laid down by Lord Stowell [58] is in harmony with these principles. Speaking of *enemy's* property he says "If impossible to bring in their (the captors') next duty is to destroy enemy's property. Where doubtful whether enemy's property and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the Captor's own State—to the neutral it can only be justified under any such circumstances by a full restitution in value. These are rules so clear in practise that they require neither reasoning nor precedent to illustrate or support them."
>
> It follows that if Capt. Semmes were to execute his threat of destroying any of the Inman line of steamers, he would be guilty of a grave offence against international Law, and that the Government of the so-styled Confederate States would be bound to make ample and complete restitution to the British owner.

[57] Adm. 1/5799. Hammond to Admiralty, Nov. 15, 1862, with copies of Inman to Russell, Nov. 5, and Hammond to Inman, Nov. 13.

[58] Here Russell cited *The Felicity* (2 Dodson, p. 386), and *The Actaeon* (*ibid.*, p. 48).

> That restitution might according to international law be sought for by the parties interested taking legal proceedings before the Confederate Prize Courts, but the international wrong in case of the destruction of these vessels would be of so grievous a character that H. M.'s Govt. would hold themselves free to demand instant relief from the Confederate Govt. without waiting for or going through the forms of judicial proceedings.[59]

In November, 1862, Earl Russell informed the Liverpool Chamber of Commerce that "owners of any British property, not being contraband of war, on board a Federal vessel captured and destroyed by a Confederate vessel of war, may claim in a Confederate Prize Court compensation for the destruction of such property." [60]

Admiral Sir James Hope, who succeeded Milne in command of the North America and West Indies station in March, 1864, proposed drastic action to prevent the destruction of British neutral prizes by Confederate cruisers. On learning of the destruction by the *Alabama* of the bark *Martaban*, recently transferred from American to British registry and sailing under the British flag,[61] he ordered two of his officers to board the Confederate commerce destroyer and demand a written pledge from her commander not to destroy British prizes without sending them before a prize court. If the Confederate officer refused to give the required pledge, his ship was to be excluded from British ports. If he had already destroyed an uncondemned British prize, his ship was to be captured and sent to England for adjudication, unless he gave a bond to the full value of the vessel and cargo destroyed.[62] Lieutenant Charles M. Morris, commanding the *Florida*, replied "that it has always been my intention, and now is my intention, to allow all neutral vessels (*i.e.* vessels producing legal papers) to pass, and that such are my instructions from my Government." [63] The Law Officers, however, reported

> That although the propositions of Law relied upon by Adml. Hope in his Confidential Communications to the Commr. of the 'Florida' are perfectly accurate and though it would be necessary for H. M.'s Govt. to treat as unlawful the destruction of any British Vessel by a Confederate Cruizer in the circumstances supposed by him (if such a case were to occur) we are nevertheless of opinion that the Adml. has fallen into error both in requiring any engagement from the Confederate Captain on this subject and also in proposing to cause the exclusion of the

[59] Adm. 1/5799. Russell to Stuart, Nov. 15. Copy in Hammond to Admiralty, Nov. 15, 1862.

[60] London Times, Dec. 2, 1862. Hammond to Thomas Chilton, President of the Liverpool Chamber of Commerce, Nov. 29, 1862. *Cf.* O. R. N., Series II, Vol. III, pp. 618–619, 714, 720, 841–845, 933; Raphael Semmes, Service Afloat, pp. 554–555.

[61] O. R. N., Series I, Vol. II, pp. 581, 591, 792; Semmes, Service Afloat, pp. 715–719.

[62] Adm. 1/5872. P. 213; Adm. 1/5873. P. 340; Adm. 1/5922. P. 11. Hope to Admiralty, May 2, June 30, 1864; Jan. 9, 1865.

[63] O. R. N., Series I, Vol. III, pp. 616–617.

> 'Florida' if such an engagement is declined. A neutral is not entitled to assume, a priori that a belligerent will act contrary to international law, and still less to require security in the shape of an engagement against such a contingency. The circumstances as to the 'Martaban' do not appear to us sufficient to introduce any exception in the present case . . . it would have been a grave error if in the event of the actual destruction at sea by a Confederate Cruizer of a Merchant Ship bearing British Colours or Papers the Adl. had (as he seems to have contemplated doing) treated the Capturing Vessel as an enemy and taken her with a view to Condemnation into a British Port. It would be for the British and Confederate Govts. in such a case to discuss between them the question; and to decide first whether the ship destroyed was, under the actual circumstances entitled to British Protection (false colors and papers being not infrequently assumed) and secondly What the nature and amount of the proper reparation ought to be.[64]

Although the Admiralty promptly countermanded Hope's orders,[65] Rear Admiral Glasse, Senior Officer at Bermuda, obtained from Lieutenant John Wilkinson, commanding the Confederate cruiser *Chickamauga*, on November 11, 1864, a written assurance of his "intention to forbear from any act similar to the destruction of the 'Martaban.'" [66]

Although bitterly opposed to privateering, the British Government recognized the right of both the United States and the Confederate Governments to employ privateers.[67] The Law Officers drew a clear distinction between pirates and duly commissioned privateers:

> A Pirate, by the Law of Nations, is "a common robber on the Seas," acting without any commission from any established authority; but with a general design of indiscriminate plunder, without having recourse to any Court whatsoever; and a Privateer capturing, for the purpose of taking in for adjudication by a competent Court, the ships or goods of those enemies of his belligerent Govt. exclusively, or those reasonably suspected of being such (against which he is commissioned and ordered to act), cannot be treated as a Pirate by neutrals, agreeably to the principles of international Law, even in the event of his committing certain irregularities in so doing.

For such irregularities, redress might be required from the government which

[64] Adm. 1/5872. Law Officers to Russell, June 1, 1864. Copy in Admiralty to Hope, June 1, No. 236 M. For Russell's adoption of these views, see Adm. 1/5902. Hammond to Admiralty, June 1, 1864. *Cf.* Adm. 1/5903. Law Officers to Russell, Aug. 12, 1864. Copy in Hammond to Admiralty, Sept. 6th.

[65] Adm. 13/35. Admiralty to Hope, June 1, No. 236 M., and June 9, No. 250 M.; Adm. 1/5922. P. 11. Hope to Glasse, June 30, 1864. Copy in Hope to Admiralty, Jan. 9, 1865. *Cf.* Adm. 1/5903. Report of Admiral Sir Frederick Grey on letter of Hammond to Admiralty, Dec. 13, 1864.

[66] Adm. 1/5873. P. 502. Hope to Admiralty, Nov. 24, 1864, enclosing copy of Wilkinson to Glasse, Nov. 11th.

[67] See Moore, Digest, Vol. VII, pp. 535–558; and E. D. Adams, Great Britain and the American Civil War, Vol. I, Chs. III and V.

had commissioned the privateer, or from its prize courts. In order to justify British officers in treating Confederate commissioned privateers as pirates,

> such Officers must have either positive proof or the strongest ground of suspicion, founded on adequate evidence, that those on board of such vessels have not merely been guilty of irregular conduct . . . but of conduct clearly amounting to "Piracy of the Law of Nations" as above explained; as (for instance) deliberate plunder, appropriation or destruction of property which they well know was not enemy's property, and which they did not attempt or intend to take before any Prize Court for adjudication.[68]

Admiral Milne's confidential instructions of May 30, 1861, [69] called attention to President Davis's proclamation offering letters of marque, and directed British cruisers in American waters to "adopt every possible lawful measure to protect British ships from molestation by such Privateers—not hesitating, in a clear case of Piracy on *British* Ships to deal with the Aggressor as a Pirate." [70] Milne closed his instructions, however, by citing an opinion of the British Advocate General to the effect that "British Subjects, who are only hostile privateersmen, cannot rightfully, when captured as such on the high seas be treated as Pirates 'jure gentium' by President Lincoln. The laws of the U. S. . . . cannot rightfully make a British Subject guilty of Piracy on the high seas merely for serving in a hostile Privateer."

When Adams informed Earl Russell on July 31, 1862, that the United States intended to issue letters of marque with a view to checking the activities of Confederate commerce destroyers, the Foreign Office requested the Admiralty to warn British admirals on foreign stations, "as serious inconvenience may ensue to British commerce." [71] Milne consequently issued a circular to his subordinates on August 25th, observing that "Should this extreme though not illegal measure be resorted to, additional watchfulness on your part will be necessary, Privateers being notoriously less scrupulous in respecting neutral rights than regularly commissioned ships of war." [72]

Various motives led to the passage of the Act of March 3, 1863, providing

> That in all domestic and foreign wars the President of the United States is authorized to issue to private armed vessels of the United States, commissions, or letters of marque and general reprisal in such form as he shall think proper, and under the seal of the United States,

[68] Adm. 1/5768. Law Officers to Russell, Oct. 5, 1861. Copy in Hammond to Admiralty, Nov. 19. *Cf.* Appendix to the British Case, Geneva Arbitration, Vol. II, p. 2; Adm. 1/5768. Law Officers to Russell, Nov. 18, 1861, enclosed in Hammond to Admiralty, Dec. 16th.

[69] Adm. 1/5759. P. 237. Printed in the document section of the American Historical Review, October, 1928.

[70] Russell thought that it was "quite right to anticipate piratical acts and outrages, and to put them down, if they should occur, with a strong hand." Adm. 1/5767. Hammond to Admiralty, June 14, 1861.

[71] Adm. 1/5799. Layard to Admiralty, July 31, 1862.

[72] Adm. 1/5872. P. 269.

> and make all needful rules and regulations for the government and conduct thereof. . . .[73]

From the outset of the war numerous Americans had suggested plans for some sort of volunteer navy which, under the stimulus of generous offers of prize money, should help protect American commerce and fill the gaps in the blockade. Some Congressmen felt that Great Britain might better observe her neutral duties, if she were reminded of what American privateersmen might effect in a war with the mistress of the seas. Seward's successful advocacy of the Act of March 3rd may have been designed simply to induce the British Government, which was alarmed at the prospect of friction growing out of privateering operations, to prevent the sailing of the Confederate vessels under construction in the United Kingdom. There is evidence, however, that Seward, partly to conciliate certain speculative shipowners, wished that some letters of marque be actually issued.[74]

When Russell observed to Adams "that if the Privateers sought for Confederate Merchant Ships they would not find any"; and "that if the Privateers interfered with neutral commerce and the Law of Blockade they would probably involve their own Govt. in very awkward questions," the American Minister replied that "the Privateers w[d] interfere in neither of these modes; they w[d] be employed in seeking and capturing, if possible, such vessels as the 'Alabama' and 'Oreto.'" [75] The regulations and accompanying instructions issued by the State Department on March 20th, nevertheless, provided for the capture of neutral as well as of Confederate prizes.[76]

Fortunately for the preservation of peace, the British Government improved its enforcement of its neutral duties, and the United States issued no letters of marque.[77] It is important to note, however, that the British Government was ready to admit the legality of American privateering, even if it should be directed against British vessels seeking to break the blockade. Late in March, 1863, the Admiralty despatched the following instructions, which had been drawn up by the Advocate General, in concert with the Attorney and Solicitor-General and the Admiralty Advocate, and approved by Earl Russell:

> No vessel owned by private persons is entitled to cruize and capture ships on the high seas unless she is furnished with a letter of marque and reprisal, or with a commission of war.
>
> A private vessel, therefore, without such letters of marque or com-

[73] Statutes at Large, Vol. XII, p. 758.

[74] See the closing pages of the writer's article, "The British Government and Neutral Rights, 1861 to 1865," in the American Historical Review, October, 1928.

[75] Adm. 1/5850. Russell to Lyons, March 24, 1863. Copy enclosed in Hammond to Admiralty, March 28. *Cf.* Lord Newton, *Lord Lyons*, Vol. I, p. 98. Russell to Lyons, March 14th.

[76] State Department, MS. Circulars, Vol. I, pp. 218–221.

[77] See E. D. Adams, Great Britain and the American Civil War, Vol. II, Ch. XIII, and the closing pages of the writer's article in the American Historical Review, October, 1928.

mission, cannot exercise any of the belligerent rights of visit, search, detention, or capture.

Neither the letter of marque and reprisal, nor the commission of war, one of which ought to be on board of every private ship exercising any belligerent right on the high seas, usually contains any express mention of neutral vessels, but only authorizes the Commander by name of each private ship to seize and take all ships, vessels, and goods belonging to the enemy, not being within cannon-shot of the shores of a friendly State. But it is competent to a private ship of war, furnished with letters of marque or a commission of war, to capture vessels carrying contraband of war or violating a blockade.

Any ship belonging to Her Majesty's navy, if it see a British merchant-ship captured by or in tow of a ship wearing a privateer jack of the United States, may send an Officer on board to ascertain the fact that such private ship has letters of marque or a commission of war on board, and, if that fact be duly verified, must refrain from any further interference.

Such is the general Law, for a private ship is not exempt from the obligation of submitting to have its letters of marque or commission of war verified.

If the private ship, which is the captor, have no such letters of marque or commission on board, it will be the duty of any of Her Majesty's ships to cause the said British merchant-ship to be set free, and if necessary to use force for the attainment of that object.

It will also be the duty of Her Majesty's ships to ascertain the name of such private ship, and any circumstances which tend to identify her as the wrong-doer, and to make a report thereupon to Her Majesty's Government.

If the letters of marque or commission of war should assume the novel form of being confined to the capture of any ship or class of ships specifically mentioned or described, such as the "Alabama," "Oreto," or similar vessels, in such a case the seizure of any British merchant-vessels by such private ship of war, bearing such limited letters of marque or commission, would be unlawful, and it would be the duty of Her Majesty's ships to cause such British merchant-vessels to be immediately set free.[78]

The French Government, too, recognized the right of the United States to commission privateers. When Lord Cowley, the British Ambassador in Paris, called the attention of Drouyn de Lhuys to the Act of March 3rd, the French Minister of Foreign Affairs replied "that the right of the U. S. Govt. to issue Letters of Marque could not be disputed and that such letters must be respected even by those Powers, which at the Congress of Paris had signed, or which had since the Congress adhered to the declaration abolishing the issue of them amongst themselves. . . ."[79]

[78] Adm. 1/5850. Hammond to Admiralty, March 28, 1863, and enclosure.

[79] Adm. 1/5851. Cowley to Russell. April 4, 1863. Copy in Hammond to Admiralty, April 11th.

PROCEDURE IN MINORITIES COMPLAINTS

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The treaties for the protection of minorities were not made under the illusion that they would take from the particular state the grave burden of settling the differences resulting from the divergent nationality of its citizens. In order to prevent the internal disputes and quarrels of the state from becoming the cause for intervention by other states, the treaties created special processes by which such disputes can be legally settled. With a view to the accurate application of these provisions it was indispensable to establish a method of procedure, a system which might very well be compared in the field of constitutional law to that of the organic decrees which are indispensable for the execution of certain of the principles forming the kernel of each constitution.[1]

This legal growth, however indispensable for the application and development of any constitution, is dependent upon and is extended slowly under expert care which is the result of experience. This difficulty is increased where it is necessary to adjust constitutions as yet without that body of legal regulations which tradition and political custom can alone give to them. This situation is intensified in the case of minorities by the extreme complexity of international problems, at the basis of which there is often a conflict of nationalistic aspirations due to historic or material interests, upon which members of the international community find it difficult to agree. Further, in dealing with the problem of establishing provisions laying down a procedure for the examination of the infraction of any measure protecting minorities, it is impossible to ignore the inviolability of treaties, just as, when drafting a law in a state, it is impossible to ignore the inviolability of the constitution of that state or its fundamental charter.

The fulfilment of the obligations resulting from the treaties for the protection of minorities is guaranteed both internationally and internally in the state. Internally it is provided by the treaties that the states shall make them parts of the fundamental law, so "that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.[2]

The international guarantee of these stipulations is formulated the same

[1] Report of M. de Mello-Franco, Minutes of the 37th Session of the Council, Official Journal, 7th Year, Feb. 1926, p. 140. (Hereafter cited as O. J.).

[2] Treaty with Poland, Article 1.

way in all the treaties.[3] Any member of the Council can call the attention of the Council to an impending or actual violation of any of the treaty provisions and of obligations resulting from them; the Council thereupon may take such action and give such instructions as it may deem proper and effective in the circumstances. The Government concerned further agrees that any differences of opinion upon questions of law or fact arising out of these articles between it and any of the members of the Council of the League shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations, which dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. The decision of the Permanent Court is final.

From this it is evident that any dispute resulting from the actual application of the minorities provisions can be settled either by the steps taken by the Council, or by decision of the Permanent Court of International Justice. But it is also important to note that only a member of the Council has the right to bring this question before the Council. Thus the members of the Council become to a certain extent public accusers acting in the public interest.

In actual practice the brevity of these regulations leads to a certain lack of clearness. Practically, it is difficult to see how a member of the Council will become aware of an impending violation or an actual infraction of the treaty, which are the conditions that may give cause for the Council to take action.[4] The legal questions are: what is the relation between the possibility of accusation and decision, which this provision gives to the Council; and, second, what is the relation between the provisions regulating the process in case of infraction of obligations for the protection of minorities and the provisions of the League regulating the process of settling international disputes in general.

Regarding the first question, that is, what gives a member of the Council the right of taking steps in the Council, light is thrown by the action of the Council in approving, on October 22, 1922, the resolution proposed by M. Tittoni.[5] The Tittoni report defined the League's guarantee as meaning, first, that the treaty provisions regarding minorities were inviolable, and, secondly, that the League must ascertain that these provisions are always observed. It drew attention to the fact that the initiative in taking official action was reserved, by the treaties, to the Council of the League of Nations, but pointed out at the same time that any minority of any member state not represented on the Council was at liberty to address to the Council petitions or communications on questions arising under the minorities treaties. Con-

[3] Treaty with Poland, Article 12: "Poland agrees that the stipulations . . . constitute obligations of international concern and shall be placed under the guarantee of the League of Nations."

[4] Records of the Third Assembly (Plenary Meetings), I, pp. 171–174.

[5] O. J., No. 8, Nov.–Dec., 1920, pp. 8–9.

sequently the minorities have the right to send their petitions to the members of the Council and to the state concerned. In accordance with the principle by which any document forwarded for the information of the Council is, as a matter of course, immediately communicated to all the members of the League, the petition is brought to the attention of all states. The Council receives the petition for its information, and also the state directly concerned in order that it can make such observations to the Council as it finds necessary. But actual consideration before the Council can be had only if some member of the Council asserts his right to call the attention of the Council to an impending or actual violation of the minorities treaties.

Probably because such general information given to the members of the Council was not considered a sufficient guarantee that a member of the Council would consider it always advisable to take action in this respect, the Council adopted a resolution on October 25, 1920, which was embodied in its rules of procedure, to the effect that all petitions should be examined, as soon as they are received, by a subcommittee consisting of the President and two other members of the Council. Furthermore, the Council directed that such inquiry should be held as soon as the petition or communication in question had been brought to the notice of the members of the Council.[6]

In practice, the President of the Council, when appointing two of his colleagues, in accordance with this resolution, has usually been guided by the following principle: the government to be entrusted with this duty should not be a government of a state neighboring that of which the persons belonging to the minority in question were subjects, nor the government of a state the majority of whose subjects belonged, from the ethnical point of view, to the same people as the minority in question.[7] On the other hand, the Council recognized, because of Czechoslovak and Polish insistence, that the one-sided information contained in a petition was not sufficient. Therefore the resolution of June 27, 1921,[8] changed the resolution of October 25, 1920, in such a way that a petition concerning the protection of minorities, not coming from a member, should, before being given to the members of the Council, be transmitted to the state concerned.

In the supplementary report to the Fourth Assembly on the work of the Council, mention was made of two notes from the Polish Government, and a note from the Czechoslovak Government,[9] concerning the principle of a modifying the protection of minorities and the rules of procedure established for this purpose. The Council, at its meeting of September 5, 1923, exam-

[6] Annex 553, O. J., 4th Year, No. 11, Nov. 1923, 1426–1432, p. 1427.

[7] M. de Mello-Franco, Report to the 34th Session of the Council, O. J., 6th Year, No. 3, July, 1925, pp. 878–879.

[8] *Ibid.*, Vol. 11, July–Sept. 1921. Resolutions adopted by the Council of the League of Nations at its 13th Session, in Geneva, June 17–28, 1921, p. 22.

[9] *Ibid.*, 4th Year, No. 5, May, 1923, pp. 480–483; *ibid.*, 4th Year, No. 9, Sept. 1923, pp. 1071–1072; *ibid.*, 4th Year, No. 11, Nov. 1923, p. 1201.

ined these proposals.[10] It decided that petitions addressed to the League of Nations may be submitted to the procedure established by the Council resolutions of October 22, 1920, and June 29, 1921, under the following conditions:[11]

Petitions

(a) must have in view the protection of minorities in accordance with the treaties;
(b) in particular, must not be submitted in the form of a request for the severance of political relations between the minority in question and the state of which it forms a part;
(c) must not emanate from an anonymous or unauthenticated source;
(d) must abstain from violent language;
(e) must contain information or refer to facts which have not recently been the subject of a petition submitted to the ordinary procedure.

This resolution provided also that in special cases the time allowed to governments for submitting their comments, *viz.*, three weeks, might be extended; and reaffirmed the principle that the examination of petitions by the subcommittee of three should be done simply in order that the members of the Council might decide whether or not a question deserved to be raised under the treaties.

The Fourth Assembly on September 22, 1923, as the result of a proposal by Mr. Gilbert Murray, delegate of South Africa, referred the question of procedure as regards the protection of minorities to its sixth committee, which examined the question on September 24, 1923.[12] The committee did not enter upon an examination of the various clauses of the resolution adopted by the Council on September 5, 1923, but confined itself to considering a particular point, namely, the clause of the resolution which restricted to members of the Council only the communication of petitions from minorities, together with the observations of the interested government, which, in conformity with the resolution adopted by the Council of June 27, 1921, had been communicated to the members of the League.

The Assembly, on the proposal of the sixth committee, adopted a resolution on September 26, 1923,[13] laying down that, under paragraph V of the resolution of the Assembly of September 21, 1922, any government member of the League might request the Secretariat to communicate to it any petition (together with the observations of the government concerned), which had been communicated to the Council.

[10] M. de Mello-Franco, Report to the 34th Session of the Council, O. J., 4th Year, No. 11, Nov. 1923, pp. 1290–1926.

[11] *Ibid.*, p. 1293.

[12] Assembly Documents, Reports to the Fifth Assembly of the League on the work of the Council, on the work of the Secretariat and on the measures taken to execute the Decisions of the Assembly, A.S. 1924, p. 37.

[13] Records of the Fourth Assembly, p. 93.

The resolution of October 25, 1920, provided that any petition or communication regarding an infraction, or danger of infraction, of one of the clauses of the minorities treaties, should, after being brought to the notice of the members of the Council, be considered as soon as possible by the president and the two other members of the Council appointed by him. On June 10, 1925, the Council decided with respect to these provisions that:[14]

> I. If the Acting-President of the Council is the representative of the state of which the persons belonging to the minority in question are subjects; or,
>
> The representative of a neighboring state of the state to which the persons belonging to the minority in question are subject; or the representative of a state the majority of the population of which belongs, from the ethnical point of view, to the same people as the persons belonging to the minority in question:
>
> The duty which falls upon the President of the Council in accordance with the terms of the resolution of October 25, 1920, shall be performed by the member of the Council who exercised the duties of President immediately before the Acting-President and also is not in the same position.
>
> II. The President of the Council, in appointing two of his colleagues in conformity with the resolution of October 25, 1920, shall not appoint either the representative of the state to which the persons belonging to the minority in question are subject, or the representative of a state neighboring the state to which these persons are subject, or the representative of a state a majority of whose population belongs, from the ethnical point of view, to the same people as the persons in question.

In practice the Minorities Committee has become a normal body for dealing with that part of the work of the League of Nations which concerns the protection of minorities.[15] The procedure of this committee is as follows:[16]

> The object of the examination of minorities petitions by the President and two other members of the Council, as emphasized in the resolution of the Council of September 5, 1923, and in the report of M. de Mello-Franco of June 10, 1925, is to establish whether it is advisable or not to exercise the right conferred upon them by the Minorities Treaties of drawing the attention of the Council to the infraction or danger of an infraction which is the subject of the petition, while reserving to other members of the Council the right of initiative which belongs to them under the treaties.
>
> It is the duty of each member of the Council to take a special interest in the protection of minorities, as M. Tittoni pointed out in his report of October 22, 1920. It is the duty of the three members of the Council, who, under the resolution of October 25, 1920, are entrusted in a special way with the examination of any communication to the League of Nations concerning an infraction of a clause of the minorities treaties

[14] O. J., 6th Year, No. 3, July, 1925, pp. 878–879.

[15] *Ibid.*, M. de Mello-Franco, Report of June 10, 1925.

[16] *Ibid.*, 7th Year, No. 2, Feb. 1926, pp. 299–311. Annex 838. (Extracts from the Supplementary Report of the Council to the Sixth Assembly. A. 7 (a) 1925. Extract No. 3.)

to conduct this examination as, in a sense, the mandatories of all their colleagues on the Council and in an objective spirit. For this reason it is important that the committee should be constituted in such a way as to guarantee its independence and its disinterestedness. All the members of the Council receive the document for the examination of which the Minorities Committee is set up, and can, if they take a special interest in the matter, inform themselves through the Secretariat of the treatment of the petition in the committee, and, if necessary, submit to the committee their own observations, either formally or informally.

A Minorities Committee is set up for each petition. After the communication of the petition to the Council, with the observations, if any, of the interested government, the Director of the Minorities Section addresses a letter, accompanied by a copy of the document in question, to the Acting-President of the Council, reminding him that it is his duty to appoint two of his colleagues in order to proceed without delay to an examination of the document. As soon as the President has sent his reply, the Director of the Minorities Section gets into touch with the two other members of the Council.

The Minorities Section, in some cases in collaboration with the Legal Section, prepares for the use of the three members of the committee a written statement on the questions of fact and law raised by the petition and by the observations of the interested government. Further, the Minorities Section is at the disposal of the members of the committee and of the other members of the Council to procure for them any supplementary information which they wish to receive.

The meetings of the Minorities Committee, or more correctly of the various minorities committees, which are simultaneously at work, generally take place during the session of the Council. Of late, some meetings have also taken place between the sessions of the Council owing to the difficulty of finding in all cases during the sessions of the Council the time necessary for the discussion of these matters, which are sometimes extremely detailed and prolonged, and which always have a delicate side to them and require the most conscientious preparation both by the Secretariat and by the members of the Council.

The examination of a case by the Minorities Committee is not, of course, restricted to the formal meetings of the committee. It is the duty of each member of the committee, as well as of the Secretariat, to proceed to this examination without delay after the communication to the Council of the documents relating to the case. The Secretariat begins an examination of the case without waiting for the distribution of this document. The discussion is accordingly, from the first meeting of the three members of the committee, except perhaps in cases of extreme urgency, based on a very considerable amount of preparatory work.

The meetings of the committee are held in private, and no formal minutes are kept. Each committee is free to adopt its own procedure.

It results from the object of the work undertaken by a Minorities Committee that its members are free to form the best opinion they can of all the factors in the case which they are asked to examine. They may take into consideration the greater or less importance of the case, and its more or less general significance. They may take into account the attitude more or less conciliatory of the interested government

towards the requests of the minority as well as the attitude more or less loyal of the persons belonging to the minority. They may form the opinion, in a particular case, that the petitioners should have resorted to the administrative or judicial authorities of the country before addressing the League of Nations. In the Minorities Committee all these factors are continually discussed and taken into consideration.

The members of the committee may, moreover, enter into correspondence with the interested government with a view to removing doubts or misunderstandings or making friendly suggestions to the government to induce it to modify its attitude on a point which, failing such a solution, would appear to the members of the committee to be a case which would be brought to the attention of the Council. Before deciding whether it should or should not draw the attention of the Council to a matter which is the subject of a petition, the members of a committee have in many cases asked the interested government for supplementary information either in general terms or by putting definite questions. In some cases, such requests have been accompanied by other suggestions, as, for example, that the interested government should postpone taking any steps which might have the effect of creating a *fait accompli* before the committee was in a position to take a decision on the question of substance, or that the government should present to the Council a special report on its intentions in the matter.

The members of the committee have, in certain cases, made personal representation to the representatives of the interested government, with the object of drawing friendly attention to the advisability of putting an end to the difficulties with which the minority is concerned. In the majority of cases the committee addresses the government in question through the Director or the Minorities Section of the Secretariat, either by writing or verbally, either formally or informally.

The committee often does not reach a final decision, even after having received all the supplementary information which it may desire. The case may be regarded rather as a link in a long chain than as an independent affair, and the members of the committee sometimes consider that such a case, although of secondary importance in itself, may be of a character to be brought, before the Council, if other similar cases should arise. The committee, in these circumstances, invites the Minorities Section to follow the case for a certain period of time, and to notify it if there should arise any fact which would appear to justify a further discussion between its members.

The elasticity of the procedure of the Minorities Committee enables its members to take account of the circumstances special to each case, and to apply the first resolution of the Third Assembly on the utility of informal and friendly communications between the League and the interested governments as the best means of encouraging in ordinary cases good relations between the governments and their minorities. The Minorities Committee has always invariably kept in mind the other resolutions of the Third Assembly. The question, for example, whether a particular case should or should not be referred to the Permanent Court of International Justice has often been examined by the Minorities Committee.

The Minorities Committee was set up essentially in the interests of the minorities, and in order that the minorities might have direct recourse to the League of Nations.

The treaties merely indicated that it is the duty of the members of the Council to watch over the execution of the clauses established in favour of the minorities. From the beginning of the existence of the League, however, the members of the Council have realized that, however keen their desire to conform with the spirit of the minorities treaties, it is in practice extremely difficult to keep directly in touch with the way in which these treaties are applied. Moreover, there are certain difficulties in the way of minorities addressing petitions directly to any particular individual member of the Council. A direct address of this character would have the same disadvantages as the old system of the protection of minorities by means of the intervention of the Great Powers, an intervention which might be made with purely political ends. The covering letter of the President of the Peace Conference to the first signatory of a minorities treaty emphasized that one of the essential reasons for the system of minorities treaties was to avoid in future the interference of a state in the internal affairs of another state, history having shown the danger of such a policy. Direct resort of the minorities to a foreign Power might, however, easily be interpreted by the government responsible for the minorities as an action contrary to the obligation contracted by the minorities to conduct themselves as loyal citizens of the country of which they are now the nationals.

The system of petitions addressed directly to the League of Nations by minorities meets these various difficulties. The Council recognized the system when it adopted the report of M. Tittoni on October 22, 1920, which indicated to the minorities the method of petitions as being an excellent means of rendering effective the protection accorded to them by the League. The Council, at the same time, wished to guarantee the minorities that their petitions would be seriously considered, and by its resolution of the 25th of the same month it set up the Minorities Committee. The Council has thus placed at the disposal of the minorities a special body which enables them to state their claims without infringing in any way either the letter or spirit of the treaties. Since then, in the interests of the minorities themselves, the work of the League of Nations has defined and strengthened the procedure of the Minorities Committee or, as it is often called, "The Committee of Three." As a result of five years' experience, this procedure has developed, as is shown by the resolutions of the Council to which reference has been made and by the increasing body of work which the committee is asked to undertake.

The procedure which is now followed in regard to minorities petitions is briefly as follows:

When the Secretariat of the League receives a petition, this petition is examined by the Secretariat in order to ascertain whether it fulfils the conditions necessary for it to be admitted. If the conditions are fulfilled, the petition is communicated to the state concerned.[17]

If the state concerned raises for any reason an objection against the petition being admitted, the Secretary-General submits the question to the President of the Council, who may invite two other members of the Council

[17] See above, p. 541.

to assist him; if the state concerned so requests, this question of procedure may be placed on the agenda of the Council.

If the petition is recognized as admissible, the state concerned must declare within three weeks following the communication whether it wishes to present any observation or not. In the event of the state desiring to present observations, a period of two months, including the three weeks following the communication, is allowed for their submission. This period may be extended by authorization of the President of the Council if the state concerned so requests and if the circumstances appear to render it necessary.

The petition, together with the observations of the government, is communicated to the members of the Council for their information. Any state member of the League may also, if it so requests, obtain communication of these documents.

The President of the Council invites two other members of the Council to assist him in the examination of the documents.[18] If one of these members, or any other member of the Council thinks it desirable, he may bring the question to the attention of the Council, which, once the question has been submitted, may "take such action and give such instructions as it may deem proper and effective in the circumstance." But the same right belongs to the members of the Council even if no complaint by a minority is before the Council. When the question is dealt with by the Council, a representative of the state concerned is present.[19]

In the event of any difference of opinion as to the questions of law or fact between the government concerned and any state member of the Council, this difference is held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations and the question may be referred to the Permanent Court of International Justice, whose decision is final.

It is clear that the complaining minority is not represented before the Council. If no member of the Council calls the attention of that body to a case, the Council does not deal with the question. The complaint is not formally rejected, but is simply not dealt with. It is possible that the matter may be brought later before the Council by a Council member. The states which are not members of the Council learn about the decisions, but have no influence upon the consideration of any complaint, though they are at liberty to address to the Council petitions or communications. However, such acts have only the character of information pure and simple, and the Council can notice it or not at its own discretion.

PROCEDURE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

What is the relation between the process before the Council concerning the violation of an obligation for the protection of minorities and the proceedings

[18] Subject to the limitations of the Council resolution of June 10, 1925.

[19] Article 4, S. 5, Covenant of the League of Nations.

of the Permanent Court of International Justice in case there be a dispute about legal and actual questions relating to the provisions between the signatory states and a member of the Council? This question was dealt with in the sixth committee of the Third Assembly on September 6, 1922. In a debate, which lasted over six meetings of the committee, the discussion centered around the proposals of Mr. Gilbert Murray and Dr. Beneš. The text of the second resolution as finally adopted is as follows: [20]

> In case of difference of opinion as to questions of law or fact arising out of the provisions of the minorities treaties between the government concerned and one of the states members of the Council of the League of Nations, the Assembly recommends that the members of the Council appeal without unnecessary delay to the Permanent Court of International Justice for a decision in accordance with the minorities treaties, it being understood that the other methods of conciliation provided for by the Covenant may always be employed.

It should be noted again that the judgment of the court is final and without appeal, though Article 61 of the Statute of the court provides that

> an application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also the party claiming revision, always provided that such ignorance was not due to negligence.

The advisory jurisdiction of the court has, in practice, proved to be of great importance.[21] Cases involving the protection of minorities in general and requiring elaborate arguments have been referred to the court for its advisory opinion.[22] Up to the present the reference of disputes or questions to the court regarding minorities for advisory opinions under Article 14 of the Covenant has always been made by the Council. The regular course is for a resolution to be passed for this purpose, which in turn is transmitted to the court by the Secretary-General of the League with a formal request, signed by him, for the court's opinion. The resolution itself sometimes states the facts giving rise to the points in issue, but in other instances they are set forth in accompanying documents. The actual question submitted to the court is always stated in the resolution and is either repeated *in extenso* or incorporated by reference in the request. Together with the resolution and request, the Secretary-General, in accordance with the above rule, sends to the court all the documents which appear to be relevant, but it is always open to the court to apply to him for any further information which it may require.

[20] Resolution II, Records of the Third Assembly (Plenary Meetings), I, p. 186.

[21] See M. O. Hudson, "The Advisory Opinions of the Permanent Court of International Justice," International Conciliation, No. 214, Nov. 1925.

[22] German Settlers in Poland; Acquisition of Polish Nationality; Exchange of Greek and Turkish Populations.

Article 73 of the Rules of Court provides that "The registrar shall forthwith give notice of the request for an advisory opinion to the members of the court, and to the members of the League of Nations, through the Secretary-General of the League, and to the states mentioned in the Annex to the Covenant. Notice of such request shall also be given to any international organizations which are likely to be able to furnish information on the question."

The Registrar in every case sends to the Secretary-General an appropriate number of certified copies of the resolution and a request for transmission to the members of the League, and notifies non-members who are concerned or mentioned in the Annex of the Covenant by sending them copies of the same document direct. It has also been the practice of the court to give the like notice to states which are neither members of the League nor mentioned in the Annex to the Covenant, when they seemed to be concerned in the matter referred to the court.[23]

Originally there was no provision for the presentation of oral information, but on September 7, 1927,[24] the Permanent Court of International Justice made an amendment to Article 71 of its rules. The effect of this amendment is that where the court is asked for an advisory opinion upon a dispute actually in existence between two or more states, these states will have the right, as though they were parties to the litigation, of appointing, in pursuance of Article 31 of the Statute of the Court, one of their nationals to act as a judge *ad hoc* whenever they have no national judge amongst the ordinary members of the court.

The article in question reads as follows:[25]

> Advisory opinions shall be given after deliberation by the full court. They shall mention the number of the judges constituting the majority.
>
> On questions relating to an existing dispute between two or more members of the League of Nations, Article 13 of the Statute shall apply. In case of doubt the court shall decide.
>
> Dissenting judges may, if they so desire, attach to the opinion of the court either an exposition of their individual opinion or the statement of their dissent.

Article 74 of the Rules of the Court provides that advisory opinions shall be printed and published in a special collection for which the Registrar is responsible.[26]

[23] See the case of German Settlers in Poland, Publications of the Court, Series C, No. 3, Vol. III, Tome II, p. 1040; Acquisition of Polish Nationality, in *ibid.*, Series B, No. 7, 8. In one case, that of the German settlers in Poland, the power of the court to take this course was questioned on behalf of the Polish Government in regard to the notification given to Germany, *Ibid.*, Series C, No. 3, Vol. III, p. 1051.

[24] The Monthly Summary of the League of Nations, Oct. 15, 1927, Vol. VII, p. 270.

[25] Publications of the Court, Series D, No. 1, Statute of the Court. Article 71 as amended by the Court on Sept. 7, 1927.

[26] Publications of the Court, Series B. The speeches and documents relating to advisory opinions are published in Series C. For further discussion and details of the court procedure

It must be noted that Article 34 of the Statute provides that only states or members of the League of Nations can be parties in cases before the court. But a state can appear on behalf of a private person (including corporations), at least if such person is one over whom it has a right of protection according to international law, *e.g.*, in addition to its own nationals, a national of a protectorate, or of a country subject to a mandate. The minorities treaties give the right and duty to the members of the Council of the League to protect minorities in certain countries, and in connection therewith differences can be referred to the court.[27] In a case arising under one of these treaties it could not, of course, be objected that the state or states acting on behalf of one or more members of a minority was improperly representing the individual or individuals in question. If a state took it upon itself to act on behalf of a person whom it was not internationally entitled to represent, it is submitted that it would be open to the other party to raise the objection before the court, which would have power to decide the point as one of the issues in the case.[28]

Inasmuch as there are several states signatories of the provisions relating to the protection of minorities, it should be noted that Article 62 of the Statute of the Court provides as follows:

> Should a state consider that it has an interest of a legal nature which may be affected by the decision in a case, it may submit a request to the court, to be permitted to intervene as a third party. It will be for the court to decide upon this request.

The Rules of Court lay down the procedure to be followed by the state desirous of availing itself of this right. Article 38 states that an application for permission to intervene, under the terms of Article 62 of the Statute, must be communicated to the Registrar at the latest before the commencement of the oral proceedings.[29] Such application is immediately communicated to the parties, who send to the Registrar any observations which they desire to make within a period to be fixed by the court, or by the President should the court not be sitting.[30]

Article 63 of the Statute provides that:

> Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

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see A. P. Fachiri, The Permanent Court of International Justice, which is probably the best book on the subject.

[27] Fachiri, *op. cit.*, p. 54.

[28] See Jurists' Committee's Report, *Proces Verbaux* of the Committee, pp. 722–724, quoted in Fachiri, *op. cit.*, p. 54.

[29] Article 50 provides what such application must contain.

[30] Fachiri, *op. cit.*, p. 111.

The procedure is quite extraordinary in international relations. It is evident that these two forms, namely, the process before the Council and the proceedings of the Permanent Court of International Justice, do not exclude each other, and that a possible dispute can be settled according to the conditions and ways which the Covenant prescribes for the settlement of international disputes as a whole. Consequently, for example, the treaty between Czechoslovakia and Austria, concluded at Brno on June 7, 1920,[31] and a supplementary agreement at Karlovy Vary on August 23, 1920,[32] contained provisions for the protection of the minorities, and provided, in case of eventual disputes which might arise, in Articles 21–30, a special procedure, by which both parties use only their right given to them in Article 13 of the Covenant.

Provision is made in the minorities treaties for a possible modification of the minorities provisions. This can be affected by a majority of the Council of the League of Nations. This point alone constitutes a great advance on the earlier system. If experience shows that any of the provisions of the treaties is unsuitable or dangerous to the security of a state, a definite means is provided by which they can be amended and the signatory Powers explicitly agree to accept any such modification. Whereas previously the exact terms of the obligations entered into by the various states had been defined once and for all, in 1919 it was realized that, in order to make the protection of minorities really effective, machinery must be created for amending or modifying the original terms, should these prove inadequate for the purpose. The earlier history of the subject had shown that legal subtleties might be resorted to which would satisfy the letter but not the spirit of the various treaty clauses, and it was indispensable that proceedings of this kind should be safeguarded against. Moreover, for fresh action on the part of the numerous Powers unanimity had previously been necessary and political rivalries had made this very difficult of achievement. Hence Article 12 of the Polish treaty provides that the terms of the obligations themselves may be modified by a mere majority vote of the Council of the League of Nations, thus rendering tactics of obstruction less certain of success than in former days.

A desire of any minorities so to change existing arrangements as to disrupt their connections with their states is practically impossible of realization, for it would mean changing not only the treaties on which the protection of minorities is based, but also changing the basis upon which the entire new legal system of Europe is founded. Meanwhile, there is no reason to fear such development, because the whole League of Nations stands unanimously on the principle that the protection of minorities is conditional upon the loyalty of the minorities to the states of which they are citizens. This is clearly stated in Article 3 of the resolution of the Assembly of the League of September 21, 1922, which states that " . . . the Assembly . . . also em-

[31] Treaty Series (No. 98), III: 189–225. [32] Treaty Series (No. 99), II: 225–232.

phasizes the duty incumbent upon persons belonging to racial, religious or linguistic minorities to coöperate as loyal fellow-citizens with the nations to which they belong."

On the whole, the international guarantee of the treaties for the protection of minorities means for these states advantage rather than burden. The ideal of absolute sovereignty must not make us blind to the political gain that accrues to those states. A double advantage can be seen. First of all, that very dangerous and also not very useful means of leaving the protection of minorities to the guarantee of the Great Powers, used during the nineteenth century, was entirely given up. This formerly allowed the Great Powers the possibility of interfering in the affairs of newly-formed states, which were consequently already more or less dependent on their will. The present arrangement, which transferred the question of protection of minorities from the political sphere to the sphere of law, protects the signatory states from interference to a greater extent than the pre-war arrangement would have done. Secondly, Austria-Hungary and Turkey always have been full of nationalistic disputes, which were not only tending to annihilate the sovereign states, but, in many cases, the nationals themselves. These disputes left an atmosphere of disintegration, in which the new states have a very hard task of consolidation. In these circumstances it is a benefit for the new states to be able to show before the international forum that the dissatisfaction of the members of the minorities with the new arrangements of state conditions is not justified, that those who are the most noisy are the ones who do not like the new state structures, and who, until the World War, were most oppressive to their minorities.

The administrative regulations of the Council of the League, and eventually the jurisdiction of the Permanent Court of International Justice, is the surest guarantee of the signatory states against international dangers which would otherwise imperil them due to the disintegrating tendencies of the elements dissatisfied with the new international regulations.

THE EFFORTS FOR INTERNATIONAL PROTECTION OF SCIENTIFIC PROPERTY

By Stephen B. Ladas

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Until the World War the rights of intellectual property were generally divided into two classes: industrial and artistic or literary property, corresponding to two separate kinds of creations: those aiming at industrial results and those possessing an aesthetic or literary character. This classification, accepted as a matter of course, produced, as will be seen, some difficulties and led to unsatisfactory results in certain cases. Soon after the end of the war a new class of intellectual property began to be discussed: the scientific property. Its claim to existence and protection was not primarily due to theoretical speculation and developments of doctrine, but to practical causes.

The intellectual class, especially in European countries, emerged from the war impoverished, in contrast to the classes of business men and workmen. A movement for a more adequate protection of authors' rights resulted in France and Belgium in legislation recognizing in favor of "artists" and their legal representatives of a "*droit de suite*" which cannot be adequately rendered in English.[1] By virtue of this right, the artist who has ceded his work for any price may "follow" it later in its successive public sales in order to collect a royalty on the sale price. It will be seen that the right may be claimed only by "artists" (painters, sculptors, etc.) and only in case of public sales; and it may be exercised during the legal duration of the copyright.[2]

The movement was not spent with this legislation. As it often happens, the satisfaction of a part of claims pressing for recognition makes the pressure of the remaining stronger. It was felt that inventors should be presented with a more generous reward than the short period of exclusive use of the invention. A "*droit de suite*" in their favor and against manufacturers using their invention after the lapse of the patent seemed a proper legislative reform. On the other hand, another large class of intellectual workers was found to be treated very unjustly by the law. While authors enjoyed copyright and inventors could obtain patents, scientists and, generally, persons making scientific discoveries could claim no economic benefits out of the industrial progress based on these discoveries. They remained in poverty while others were enriched using their creative work. A reform in this respect, it was be-

[1] French law of May 20, 1920, and decree of Dec. 17, 1920 (*Bulletin des Lois*, 1920, I, p. 2055, and II, p. 5569).

Belgian law of June 25, 1921 and decree of Sept. 23, 1921 (*Pasinomie*, 1921, pp. 343, 696).

[2] See a study on the French law and its origins in an article by Albert Vaunois in *Le Droit d'Auteur*, 1920, p. 101.

lieved, would encourage scientific work, induce young men to devote their efforts to the study of science, and might be made to benefit laboratories which were in great distress.[3]

PROFESSOR BARTHÉLEMY'S PROPOSITION

This movement in France led to the first proposition of law ever introduced on the subject of scientific property. It was deposited in the French Chamber of Deputies by Professor J. Barthélemy.[4] This proposition aimed at two things: the recognition and enforcement of the rights of scientists in their discoveries, and the reform of the French patent law of 1844 for the purpose of affording a more adequate and broader protection to inventors.

The fundamental principle of Barthélemy's proposition is this: If a person, by his intellectual activity, has produced benefits which otherwise would be impossible, justice requires that he can obtain a part of these benefits.[5] This principle is given expression in the first article of the proposition providing that "every new discovery or invention of whatever nature, confers upon its author . . . the right to demand a royalty from all those who draw an industrial profit therefrom." This would put an end to the exclusion of scientific discoveries from legal protection under the patent law of 1844, in particular its Article 30 which declares null and void all patents concerning "principles, methods, systems, discoveries and theoretical or purely scientific conceptions of which no industrial applications are indicated."

Whenever a patent cannot be obtained under the provisions of the law of 1844 by the author of an invention or discovery, there are two ways provided in the Barthélemy proposition by which he may exercise the right recognized in the first article: (a) He may take no action so long as no application is made of his discovery. But as soon as a practical application of the theoretical discovery is made by a manufacturer, the author may present a claim for a part of the manufacturer's profits, something analogous to the dramatic author's right in the presentations of his play. The royalty due to the scientist begins in this case from the time the claim is presented. The author may prove the paternity of the discovery by any kind of evidence. (b) He may, also, obtain a "patent of principle" under the conditions of the patent law of 1844. This patent differs from ordinary patents in that it does not confer on the patentee an exclusive right to work or use the discovery, but only the right to grant compulsory licenses for the working of the practical applications of the discovery. In this case the right of the author to claim royalties begins from the date of filing the application for a "patent of principle." Consequently, any one is free to work the invention or dis-

[3] See on the movement in France and the activities of M. Lucien Klotz; Fernand-Jacq, "*Le Droit de Suite des Inventeurs sur leur Découvertes*" in *Journal des Economistes*, 1922, p. 332; and *Propriété Industrielle*, 1922, p. 82, and 1923, p. 113.

[4] No. 4233, *Chambre des Députés, session de 1922.*

[5] No. 4233, *Chambre des Députés, session de 1922*, p. 3.

covery, but he must pay for all the time he is working it and not from the time a claim is presented to him by the scientist, as in the first case.

The amount of royalty is to be determined by agreement between the parties and, in its absence, by the tribunals. Scientists' rights, like artists', are to last during the life of the author and for fifty years after his death.

The fundamental principle of Professor Barthélemy's proposition, namely, the recognition of a right of scientists in their discoveries for which no practical application is indicated, met with general approval. It was agreed that the requirement of the patent law that an invention or discovery should be industrially applicable, amounted to a spoliation of scientists; that it was dangerous for scientific progress to compel savants to go into industry and invent the practical applications of their theoretical discoveries; and that the existence of scientists' rights should not be dependent on compliance with formalities and conditions which they are likely to neglect by their devotion to their searches.[6] However, the means of protecting scientific property and securing to scientists their due share in the industrial profits caused by their discoveries, as provided for in the Barthélemy proposition, raised objections from various quarters.[7] It was felt that the assimilation of scientific property to artistic, on the one hand, and the engrafting of the "patent of principle" and "patent of author" on the patent law of 1844 was rendering the whole plan hybrid and confusing.

THE PROJECT OF THE C. T. I.

The *Confédération des Travailleurs Intellectuels* of France undertook to study more thoroughly the question of scientific property and adopted a new text, in many respects different from Professor Barthélemy's proposition, which was also submitted to Parliament. The objections against the latter proposition and the ideas underlying the new project are dealt with in the work of Messrs. Dalimier (M.D.) and Gallié, attorney, published under the auspices of the Confederation of Intellectual Workers.[8]

While, indeed, Professor Barthélemy bases his proposition on a combination of industrial and artistic property, the text of the C. T. I. assimilates almost completely scientific property to artistic. According to this text, authors of scientific discoveries or inventions have an exclusive right to draw benefit therefrom. This "exclusive right" consists in their claim of "a right of author" in the working by others of their inventions or discoveries. The paternity of the discovery or invention must be proved, not by any means of evidence as in the Barthélemy proposition, but by a "sufficient publication."

[6] Fernand-Jacq, *"La Propriété Scientifique"* in *Le Journal des Economistes* of March 15, 1923; *Propriété Industrielle*, 1922, p. 82, and 1923, pp. 113, 115.

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[8] *La Propriété Scientifique, Le Projét de la C. T. I., Paris, 1923.*

The right of the scientist can only be established by such proof. The publication in some approved periodicals would be considered sufficient publication.

The authors of discoveries or inventions cannot object to the industrial or commercial working of new applications of their discoveries or inventions, although they may collect a "right of author" for such working. The amount of this royalty is to be determined by agreement between the parties or by the courts. Authors may be represented, in their relations to persons working their discoveries, by a professional body. They may also appoint this body as supreme arbiter to determine the amount of the royalty. This provision nullifies that which concerns the interference of the courts. It implies that manufacturers have to submit to the decisions of this professional body, which cannot give any guarantee of impartiality. The right of authors of discoveries or inventions is enjoyed during their whole life or by their legal representatives during fifty years from the publication of the discovery or invention.

While many theoretical and juridical objections to this project were raised in France, the practical objection was also voiced that it was impossible to impose on French industry alone this new charge of an uncertain and probably great amount in favor of authors of discoveries and inventions, thus rendering it less able to compete on the international market. If scientists ought to be awarded a share in the profits of industry, this could only be brought about, it was claimed, by simultaneous legislation in the important industrial countries or by international legislation.[9] The Director of the International Bureau, Professor Röthlisberger, in his report of December 9, 1922, to the International Committee on Intellectual Coöperation, was on this point of a contrary opinion; he observed that never before has progress of this sort been made directly by international action and that such intervention only took place after successful experiments in particular countries.[10]

SENATOR RUFFINI'S PLAN

The Committee on Intellectual Coöperation of the League of Nations took cognizance of the question of scientific property on the proposal of its chairman, Professor Bergson, at the ninth meeting of its first session on August 5, 1922, and appointed a subcommittee consisting of Mr. Destrée (Belgium), Dr. Millikan (United States), Senator Ruffini (Italy), and Mr. De Torres Quevedo (Spain), to study the draft proposed by the French Confederation of Intellectual Workers and to investigate in a general manner the question of artistic, scientific and literary copyright.[11] The subcom-

[9] Fernand-Jacq, "*La Propriété Scientifique*" in *Revue Générale de l'électricité*, 1923, p. 463, and in *Le Journal des Economistes* of March 15, 1923; also Marcel Plaisant, Rapport No. 1690, *Chambre des Députés, session de 1925*, p. 54.

[10] See *Propriété Industrielle*, 1923, pp. 16, 23–24.

[11] Doc. C, 711, M, 423, 1922, XII, p. 34.

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[10] See *Propriété Industrielle*, 1923, pp. 16, 23–24.

[11] Doc. C, 711, M, 423, 1922, XII, p. 34.

mittee appointed Senator Ruffini as its *rapporteur* for the juridical study of the question of scientific property. The latter presented his report to the Committee on Intellectual Coöperation at the fifth meeting of its second session, July 28, 1923.[12]

The report submitted by Mr. Ruffini is a most remarkable critical and constructive work. The committee approved Mr. Ruffini's plan and recommended the plan warmly to the Council and the Assembly of the League of Nations. The latter, on the proposal of its Fifth Committee, adopted a resolution approving the principle of Senator Ruffini's plan and decided to transmit it to the various governments and ask them to communicate to the Secretariat of the League of Nations their observations, in order that the Committee on Intellectual Coöperation may draw a definitive draft convention to be signed and ratified by all the states.[13]

Mr. Ruffini points out first the two considerations that led the subcommittee to study the question of the protection of scientific property. As a remedy to the critical condition of scientific work in all countries, a remnant of the war, it was proposed to afford the young generation the prospect of an adequate remuneration in order to recruit men of high standard. To this consideration of a temporary character was added a permanent one, that is, the flagrant injustice of denying protection to savants for the creations of their mind similar to that enjoyed by authors of artistic or literary works and by inventors. He concluded that "there is a great work of justice to be done and an ill to be redressed."

Mr. Ruffini finds that the greatest authors have failed to give an adequate explanation of this lack of protection or have denied the problem by reason of their inability to solve it. He finds also that there is the greatest divergence of opinion on the nature of inventors' and authors' rights, and that it would do no good to enter into questions of terminology and of legal speculation on the nature of rights of scientists in their discoveries. However, he goes into the duality of the régimes of protection of inventions, on the one hand, and literary and artistic works, on the other, and concludes that the two kinds of rights are in substance identical, the differences of the two régimes referring only to the scope of the rights and the method of protection. He finds several kinds of creations (for instance, designs and models), which are difficult to classify under either of the two categories, and points out that the protection of scientific discoveries which partake of the character of invention as well as of literary or artistic creation, would link up the two régimes and achieve their unification, which has only been precluded by unsystematic, disconnected and empiric legislative action and by incomplete and inadequate doctrinal theory. All this is brought out by Mr. Ruffini with great clarity and a wealth of documentation.

[12] The report was published separately as Doc. A, 38, 1923, XII.

[13] Resolutions and Recommendations adopted by the Assembly during its Fourth Session, Off. Journal, Special Suppl. No. 11, October, 1923, p. 25.

Next, the report deals with the general and specific objections raised against the recognition of rights of scientists in their discoveries. It dismisses easily the former, pointing out that they are like the objections raised at other times against authors' and inventors' rights. Mr. Ruffini reminds us that such men as Prudhon, Macaulay, and Mazzini were opposed to any sort of recognition of intellectual property, believing that authors should find sufficient compensation in glory and the gratitude of mankind and at most receive the assistance of the nation, and that the economist Michel Chevalier (1863) in France considered the granting of patents of inventions "an outrage on liberty and industry, an obsolete legacy of the past."

The objection that a scientific discovery is the result of collective coöperation may also be made in regard to inventions and literary and artistic works, yet it has not been considered serious against recognition of authors' and inventors' rights. The same may be said in respect to the objection of the difficulties of determining the priority of a scientific discovery or invention. Mr. Ruffini cites examples of cases where great difficulties appeared for determining the priority of inventions and artistic creations, yet the courts have been able to solve them.

As to a last objection that many complications would result from the attempt to protect scientists' rights, Mr. Ruffini quotes Professor Barthélemy's remark that "complications and progress necessarily go hand-in-hand, consequently the justice meted out to men of science would obviously be more complicated than the brutal injustice of which they had hitherto been the noble and uncomplaining victims."

Mr. Ruffini's report deals also with the technical legal objections against recognition of scientific property growing out of the alleged distinction between real invention and pure discovery and between artistic creation and scientific conception. Scientific discoveries or conceptions are refused the character of creation which inventions and artistic works possess. Mr. Ruffini shows how theory in this respect is uncertain and its results lack positiveness and consistency.

To the French view that any recognition of scientific property should be made through international legislation was opposed the opinion of the Director of the United International Bureaus of Industrial and Literary Property that no international agreement may be expected unless and until the reform is tried and experimented on in a number of countries. Mr. Ruffini, faced with these opposing views, concludes in favor of the French view, arguing that the opposite opinion does not take sufficient account of the decisive fact that international conditions today are totally different from the time when the protection of industrial property and artistic works began developing in the different countries. The isolation of each country in the eighteenth and the first half of the nineteenth century rendered impossible original international legislation on these subjects. The present-day close interdependence, especially economic, of the various nations makes

possible such an understanding. A further point intimated also by Mr. Ruffini is that if any country should be left free to regulate as it sees fit the protection of scientific property, wide divergences of legislation would arise, which would constitute a stumbling-block to all future efforts for international regulation, as is the case today in the matter of the other intellectual rights.

When the question of recognition of scientific property is thus cleared of all its difficulties, the next problem, a most important one, is the nature of the reward which the scientist is to receive. Mr. Ruffini opposes, in principle, the system suggested originally by Mr. De Torres Quevedo, a member of the subcommittee, and further developed later by Mr. Gariel, Vice-Director of the International Bureau of Berne. According to this system, scientists whose discoveries are applied industrially by others should be remunerated out of a fund formed from subscriptions paid by, or contributions levied on, the industries profiting by the discoveries. Mr. Ruffini finds that similar systems were proposed formerly by enemies of industrial and artistic property and that such systems of patronage or prizes are obsolete, amount to almsgiving and imply a lack of consideration for men of science. A prize system should only be assented to in case of scientific discoveries for which no direct relationship to an industry may be established and by which all industry, generally, benefits indirectly.

Mr. Ruffini has no illusions in regard to the difficulties of drawing a text which may give satisfaction to all countries, and is aware of the effort required to enlist the support for the innovation of the "great and complex world of magistrates and lawyers"—a point to which attention was called by Dean Wigmore of the Northwestern University School of Law by a memorandum addressed to the subcommittee.[14] In endeavoring to clear all these difficulties from the path of the League of Nations, he lays down the following "guiding principles":

I. Scientific discoveries should procure pecuniary advantages to their authors and cease to be considered as natural riches. In regard to this fundamental principle, Dean Wigmore in his memorandum to the subcommittee made an important reservation. He called attention to the fact that the greatest part of discoveries of a generation or two ago consisted in presenting a scientific explanation of obvious facts or practices of human life. This justified in a way the lack of legal protection of such discoveries. Modern discoveries, however, such as radium, the wireless, etc., no longer explained existing facts and practices of our life, but gave rise to new activities and new industries which had never been contemplated before. This new aspect of scientific discoveries ought to lead to the recognition of a right of scientists in their creations. But those of the discoveries of the present day which have the character of the old ones ought to be clearly distinguished.

[14] Report on Scientific Property submitted by Senator Ruffini (A, 38, 1923, XII). Annex p. 28.

II. A scientist should not be required to apply or work his invention himself, as he is not fitted to that and should not be taken away from his researches. His right should consist in a royalty "on the money value which his discovery is likely to acquire by means of its practical application and its industrial utilization, within a specified period of time."

III. The distinction between invention and discovery should be abandoned. But, in accordance with Dean Wigmore's observation, scientific discoveries forestalled by practical experience may only aspire to a prize.

IV. All distinctions in regard to the character of the intellectual product, whether it concerns physics, chemistry, biology, or any other science, should be abolished. This is perhaps the most debatable point.

V. In principle, the rights of scientists, like those of artists and writers, should be recognized irrespective of any requirement of formality or declaration. Savants are likely to neglect taking steps to secure their rights. However, in view of the social interest in scientific discoveries and the essential condition of establishing priority for any claim out of a discovery, regard should be paid to the regulations on inventions.

VI. From the four means available for establishing the priority of an idea or discovery, mere publication, the perforated envelope, such as the Soleau envelope, the "patent of principle" and the ordinary patent, scientists should be able to choose that one which is more adapted to their discovery.

VII. The right of scientists ought to have a duration equal to that of literary or artistic copyright, namely, the life of the scientist and fifty years after his death. In case a scientist should take a patent for his discovery, on the expiry of the patent he should continue enjoying the scientist's rights on the industrial utilization of his discovery by others.

VIII. All disputes concerning the priority of a discovery or the royalty payable to a scientist should be decided by the law and the courts of each state when both parties belong to that state. In case the dispute exists between nationals of different states, resort should be had to compulsory international arbitration, which guarantees greater objectivity and impartiality.

At the end of his exhaustive report Mr. Ruffini submits the text of a draft convention embodying the above principles.

PROFESSOR GARIEL'S PLAN

It is important, before describing the reaction to Senator Ruffini's plan in the various countries, to consider the plan elaborated by Mr. Gariel, Vice-Director of the United International Bureaus of Intellectual Property.[15] For both plans challenged the attention of the interested circles and of the various governments, and both were concurrently discussed.

Mr. Gariel bases his plan on theoretical as well as practical grounds. He starts from the idea that the "right" of a scientist to his discovery is not to be regarded as similar to that of authors of literary or artistic works, nor can

[15] See *Propriété Industrielle*, 1923, p. 131.

it be compared to the inventor's right. The character of personal creation and of uniqueness inherent in a literary or artistic work is not to be found in a scientific discovery. The artist or writer gives to the world something that he alone created and that no one else could ever conceive and execute in the same way. The scientist "discovers," reveals something outside himself which was concealed to human knowledge until that time, but which another might discover as well. For the same reason, the discovery of a principle or an idea without its practical application cannot be compared to an invention. An exclusive right to use the invention is granted to the author for its practical usefulness and in order to encourage further inventions by which the world profits. A scientist cannot claim a monopoly of his discovery, which would involve a prohibition on others to avail themselves of such discovery, as an astronomer discovering a new planet cannot prevent others to avail themselves of the position of this star to explain or study other problems of astronomy. The scientist reveals to the public the existence of a sort of raw material and the latter may utilize it. He does not create anything. He only anticipates others in revealing an existing fact. The public, the industry at large, builds on such discoveries, invents new applications and derives its profits after trials and errors and the incurring of great expenses and risks. Can it be said that the scientist has a right in a part of these profits?

Mr. Gariel insists that this cannot be maintained. But in view of the indirect benefit derived by industry, in general, from the discoveries of scientists, a recognition should be made to them in the form of a reward paid out of a fund formed from subscriptions paid by, or contributions levied on, the industries profiting by the discoveries.

The amount of reward to be paid to each scientist and all questions of priority, etc., are to be determined by a commission in which representatives of industrialists, as well as of the state and of scientific bodies, are to be represented. The reward is to be given a number of years after the discovery so that a sufficient account might be taken of its practical implications. The reward may be paid in lump sum or in annuities. But no reward will be paid at the expiry of a period of years following the discovery or the death of the scientist.

This scheme is drawn primarily from a national point of view, and its application in a number of countries should precede any international application. But it may be made to conform to international relations by the constitution of an international fund formed from sums paid in by the various countries in proportion to their industrial importance, as shown by the data supplied by each country to the International Labor Office of the League of Nations.

Mr. Gariel, in a later article,[16] criticized Mr. Ruffini's plan from the point of view of the fundamental basis of the scientist's right and its exercise, and

[16] *Propriété Industrielle*, 1923, p. 169.

from the point of view of the possibility of establishing this right immediately in the international field.

A CRITIQUE OF THE ABOVE PLANS

Mr. Gariel rightly observes [17] that no sound regulation of "scientific property"—using this expression for the sake of brevity only—can be achieved without a theoretical foundation. Can the right of scientists to claim a remuneration for the industrial applications of their discoveries be based on the same theory that underlies the recognition of inventors' and authors' rights or on any other theory?

Professor Barthélemy, as well as Messrs. Dalimier and Gallié, lay themselves undoubtedly open to the criticism that they proceed by affirmation in this respect without taking the trouble to go into the theoretical justification of scientific property. The same cannot be said of Mr. Ruffini. Although he chooses to refrain, for the purposes of his draft convention, from attempting to define scientific property and determine its legal nature,[18] he goes into the quicksands of the doctrinal views of various authors attempting to distinguish real invention from pure discovery and artistic creation from scientific conception, and finds all such distinctions crude, empiric and arbitrary. However, Mr. Ruffini does not contribute a constructive theory of scientific property, being content to criticize the views of writers who deny creative element in discoveries and to rest with "the common feeling of justice which tells us that there is a wrong which must be righted."[19]

On the other hand, Mr. Gariel, rationalizing from the existing state of law and the fact that up to the present the latter has not taken into account the scientists' rights in the existing scheme of rights, concludes that there cannot be an individual right of the scientist in his discovery.[20] His conclusion is based exclusively on the view that a principle, an idea, an axiom or a law discovered by a scientist cannot be claimed as his own property in order to justify a claim by him in the profits derived by a third person using or availing himself industrially of such principle, idea or law. The latter are not creations, as artistic works, nor can they be monopolized as patentable inventions. One might suspect that Mr. Gariel is contented with affirmations just as the writers criticized by him. Why are scientific conceptions and discoveries not creations?

Much confusion arises from the fact that extreme cases are often considered. It is difficult to compare, for instance, the Ninth Symphony with the discovery of a new star. But one might also compare the discovery of

[17] *Propriété Industrielle*, 1923, pp. 169, 170.

[18] See Report of Scientific Property submitted by Senator F. Ruffini, Committee on Intellectual Coöperation, Doc. A, 38, 1923, XII, p. 2.

[19] *Ibid.*, p. 10.

[20] The same may be said of Osterrieth's study *Wissenschaftliches Eigentum*, Tübingen, 1925. However, in an article in 1923 ("*Das Geistliche Schaffen in Wissenschaft, Technik und Kunst*" in 28 *Gewerblicher Rechtsschutz und Urheberrecht*, No. 3, p. 49) this writer admitted that there is an element of personal creation in scientific research.

radium or the wireless telegraph with the painting of a common landscape, or the writing of a commonplace story. The contention that in both examples the artistic work is a personal creation which no one else could conceive and execute in the same way, whereas a scientific discovery may be made by any scientist at a given stage of scientific search because it is something existing by itself and outside the scientist's person, constitutes no argument against the recognition of creation in scientific property. The important thing is not that a scientific idea was in the air, but that it was caught by someone and revealed to the public. In this respect inventions are in no way different from discoveries. At a certain state of scientific research and technical knowledge, an invention is the fortuitous and final result of prior developments; and there are many cases of contemporaneous inventions. However, the right of the inventor who files first the invention is protected, although the latter is a work of pure chance.

All that may be said, therefore, is that scientific discoveries are simply different from artistic creations and inventions.[21] Their aim is truth, while the latter's is beauty and utility respectively. But in their particular fields all three are creations, as Pilenco has pointed out.[22] It is true that scientific discoveries are more akin to inventions than to artistic creations, but we prefer Mr. Ruffini's view that scientific property constitutes a sphere midway between the domain of artistic property, on the one hand, and industrial, on the other. His other thesis that there is no substantial difference between all these forms of intellectual creation is proved by a number of creations which partake of the character of invention as well as of artistic work. Such, for instance, are the floral creations or creations of new horticultural species, for the protection of which a bill was introduced in France in 1922. These creations, like modern scientific discoveries, were unknown when the patent laws originated. From their appearance they were relegated to the so-called public fund of knowledge. In fact, the individual interests concerned did not press for recognition until recently. But the social order is already compelled to take account of them. Legislation has already been enacted for their protection by registration in France and Czechoslovakia.[23]

And paraphrasing Mr. Gariel's use of the simile of Procust's bed in his criticism[24] of Mr. Vigneron's book,[25] we may be allowed to add that scientific property should not be adapted to the Procust beds of artistic or industrial property. It is idle to seek a personal element or the possibility of monop-

[21] See a very interesting exposition in this respect in Mlle. Suzanne Munier's thesis, *Les Droits des Auteurs de Découvertes ou d'Inventions Scientifiques*, Paris, 1925, Chapter I, especially, pp. 48 ff. Mr. Gariel's criticism (*Propriété Industrielle*, 1925, p. 210) that Mlle. Munier's book proceeds by affirmation would seem to be not well taken.

[22] *Das Recht des Erfinders*, Berlin, 1907, pp. 223 *ff.*

[23] See *Propriété Industrielle*, 1922, p. 54, and 1923, p. 31.

[24] See *Propriété Industrielle*, 1925, pp. 209, 214.

[25] Marcel Vigneron, *Essai sur la Protection de la Propriété Scientifique*, Paris, 1925.

oly in scientific discoveries similar to those of artistic or industrial property. It is sufficient, to use again Mr. Gariel's own words, that scientific discovery satisfies a human need and renders a service to society. By reason of this service and for the labor put upon it by the scientist, there is a claim on his part against third parties availing themselves of his service and of the fruits of his labor. And the whole question is whether his claim should be taken into account and satisfied by the law in the whole scheme of claims and interests protected by it.

But all ideas and all principles constituting the subject of a discovery are not creations. Dean Wigmore's subtle observation should be retained. Whenever a discovery simply explains an obvious fact or a prior practice of human life, it has no economic value; it is not a real creation. But if it reveals a new "raw material," to use Mr. Gariel's own words, a new substance or a new principle which leads to novel activities and new manufactures, such a discovery is a true creation, for the use of which a right should be recognized in favor of scientists. The latter are in such case in the same position as prospectors of mines for whom law has often recognized a share in the profits of the working of the mine.[26]

The truth is that artistic creations as well as inventions are protected by the law through the recognition of corresponding rights to their authors, because it has been found to be a sound postulate of social engineering. By the satisfaction of the demands and interests of artists and inventors, the social interest of general progress, economic and cultural, is satisfied. The recognition of scientists' rights in their discoveries is imposed by the same considerations.

It is by no means certain that Mr. Gariel's system is easier to apply. Mr. Lyon-Caen thought that the system of reward always retained a certain arbitrary character and was slow of application.[27] Besides, it lends itself with difficulty to international relations.

The exercise of the right as provided by Senator Ruffini's plan is perhaps its weakest part. Such questions as the proof of the date of a discovery, its publication, the presentation of claims, the amount of royalty, the duration of the right, and the solution of disputes,[28] raise important difficulties and are only sketched out in Mr. Ruffini's plan. As will be seen, they have formed a basis of many discussions and inquiries in these last years.[29]

[26] Marcel Vigneron's resort to the ideas of "occupation" and "specification" as the theoretical basis of scientists' rights (*Essai sur la Protection de la Propriété Scientifique*, Paris 1925, pp. 39 *ff.*) would not seem to be very helpful.

[27] See Commission on Intellectual Coöperation, Minutes of the Third Session, p. 55.

[28] See Fernand-Jacq, "*La Propriété Scientifique*" in the *Journal des Economistes* of March 15, 1923.

[29] Professor Cesare Vivante (*La Propriété Scientifique devant la Société des Nations*, Paris, 1924) makes a strong attack on Senator Ruffini's plan. With the exception of his allegation that there is no claim really on the part of scientists for the protection of their discoveries, his other points refer to the application and exercise of scientists' rights. He comes again and again to the idea of complications and uncertainties into which industry will be thrown.

FURTHER ACTION IN REGARD TO MR. RUFFINI'S PLAN

When the Subcommittee on Intellectual Property met on July 21, 1924, eleven countries had replied to the Secretariat expressing their views on Mr. Ruffini's scheme. The subcommittee did not feel in a position to propose a definitive text for an international convention, and thought it advisable to convene a conference of experts representing all the interests concerned to investigate the various objections to Mr. Ruffini's scheme, and, if necessary, to make the required modifications. It was also agreed that Mr. Ruffini, with the assistance of Mr. Röthlisberger, should prepare a supplement to his report. Resolutions to this effect were adopted by the committee in its fourth (July, 1924)[30] and sixth (July, 1925)[31] sessions. It was also decided that, before a conference of experts be convened, the industrial circles should first be consulted. This work of consultation was undertaken by the International Institute for Intellectual Coöperation, which had in the meantime been established at Paris.

An excellent report on the investigation was presented to the subcommittee on July 14, 1927, on behalf of the Legal Section of the International Institute for Intellectual Coöperation, by M. Raymond Weiss, containing an analysis of the enquiries and a constructive part dealing with possible solutions of the problem. Two currents of opinion manifested themselves in the subcommittee. Certain members thought that a fresh enquiry should be held, and others that the preparatory work had already lasted three years and had covered a vast field in various countries and that nothing more could be expected from a further investigation. The latter view prevailed, and the subcommittee adopted a resolution proposing that a special committee of experts should be convened which would have before it: (1) All the information obtained as a result of the preliminary enquiries by the International Institute; (2) A preliminary draft international convention prepared by amending Senator Ruffini's text in the light of the results of this enquiry. It was also proposed that the members of this special committee be appointed before November 15, 1927, by the chairman of the International Committee on International Coöperation. This resolution was approved by the plenary committee in its ninth session at its meeting on July 26, 1927.[32]

[30] Committee on Intellectual Coöperation, Minutes of the Fourth Session, p. 35 and Annex p. 71, and Report of the Committee, p. 19 (A, 31, 1924, XII). Also, Supplementary Report submitted by Senator Ruffini together with a memorandum on the Replies of Governments, Committee on Intellectual Coöperation, Doc. A, 29, 1924, XII.

[31] Committee on Intellectual Coöperation, Minutes of the Sixth Session, p. 21 and Annex p. 42, and Report of the Committee, p. 6 (A, 24, 1925, XII).

[32] Committee on Intellectual Coöperation, Minutes of the Ninth Session, p. 43, and Annex p. 87; also Report of the Committee, pp. 2–3 and 13. (A, 35, 1927, XII.) See also Committee on Intellectual Coöperation, Minutes of the Ninth Session, p. 43 and Annex p. 89.

For discussions and resolutions on scientific property by various national and international organizations, see *Propriété Industrielle*, 1924, pp. 16, 162, 190; 1925, p. 108; 1927,

The meeting of the Committee of Experts on Scientific Property, above contemplated, took place at the seat of the Institute for International Coöperation at Paris on December 12, 13, and 14, 1927. Its chairman was Mr. Casares, and it included among its twenty members, three members of the Subcommittee on Intellectual rights, Mr. Ostertag, Director of the International Bureaus of Intellectual Property, representatives of the Economic Committee of the League of Nations, of the International Labour Office, of the International Chamber of Commerce, and of industrialists, inventors, and scientists.[33]

At its first meeting the committee decided, on the preliminary question of the kind of remuneration of scientists for the use of their discoveries, that it was bound by the resolution of the Committee on Intellectual Coöperation convening the experts which adopts Ruffini's basic principle in this respect.

The Committee of Experts discussed the principles governing scientific property, taking into account three classes of documents submitted to it at the outset: Senator Ruffini's report; the results of the enquiries made by the International Institute; and the draft elaborated by the Institute. When an agreement on the principles was reached, a subcommittee drafted the text of a convention. This contains a preamble, is divided into five parts and twenty articles, and is shorter and more concise than the text of the Institute. By its brevity it purports to leave scope for independent national legislation on minor points.

The preamble states rightly that it is in the general interest that the authors of scientific discoveries should share in the material profits derived from the industrial exploitation of the latter and that the contracting countries "undertake to enforce by appropriate legislation the following provisions." Thus, the convention contains only general principles to be applied by domestic legislation in each country.

The definition of the right and of the discoveries for which it is recognized, is contained in the three articles of the first part of the draft. The right is a remuneration from the users of the discovery. This is Mr. Ruffini's principle of individual right and individual obligation.

Discoveries, for which a right exists, are only those open to material utilization, viz., utilization contributory to the production of a commercial commodity, and only those from which new means of production or new applications of existing means are developed. The words used are taken from

pp. 17, 126, 167. A bill for the protection of scientific property was introduced in the Italian Parliament in 1925 (*Propriété Industrielle*, 1926, p. 83) and a new bill is being prepared in France by a committee appointed by the Minister of Education (*Propriété Industrielle*, 1928, pp. 100, 157).

[33] See Report on Scientific Property submitted on behalf of the Committee of Experts by Mr. Marcel Plaisant, International Committee on Intellectual Coöperation, Doc. A, 21, 1928, XII. A. I. Also Procès-Verbal Sous-Comité d'Experts pour la Propriété Scientifique C. I. C. I. 196 (communicated to the present writer by the courtesy of Mr. Weiss, Director of the Legal Section of the Institute).

patent legislation and have a more or less definite meaning in many countries. To this restriction a negative proposition is added. Demonstrations or explanations of previous discoveries or comments thereon give no rise to this right.

The second part of the draft deals with the rights and obligations of authors. Scientists, nationals of each of the contracting countries, shall be granted in all the others the same rights enjoyed by nationals. Article 4 distinguishes between the coming into being of the right and its enforcement against users. The right is derived from the unequivocal publication of the discovery, whatever form this publication takes: an article in a scientific review, a book, a pamphlet, etc. But no claim in respect thereto can be presented unless and until a deposit of a note claiming the right over all possible material applications of the discovery is registered by an international body. This provision is intended to protect manufacturers and inventors against unknown claims and liabilities. Publication is the proof of priority in disputes between authors. Registration of the claim is the proof in disputes with users of the discovery. The duration of the right is restricted to thirty years from the date of registration, a sound moderation for a new right giving rise to so much misgiving and apprehension.

In the third part, the rights and obligations of users are enumerated. Article 8 provides that the registration of a claim of authorship of a scientific discovery does not prevent the latter's use by any undertaking (enterprise), on condition that a consideration is paid to the author. Such consideration is fixed either by agreement between the parties or, failing such agreement, by judicial procedure. The draft does not define the nature of such consideration, which may be a lump sum, an annuity, or a royalty. In the report, however, of the Committee of Experts it is unanimously recommended that the consideration may not in any case exceed one per cent. of the sale price of one and the same article for which it is due.

The use, then, of the discovery duly registered is free to any one. No monopoly, analogous to that of patented inventions, is recognized. For such use, however, a consideration should be paid. Is this a condition precedent to the use, or may a manufacturer use the discovery and then enter into negotiations with the author? The draft is not clear on this point. From the next Article 9, providing that the undertaking shall be bound to enter into negotiations with the author on receipt of an application from his part, it should be implied that neither the payment of the consideration, nor the entering into negotiations, is a condition precedent to the use of the discovery. This is sound, for otherwise the freedom and activity of industry would be hampered. Article 11 adopts a provision of the new French project of patent law for the revision of the consideration by judicial review at the end of each period of five years upon the application of either party. Article 12 contemplates cases of dispute between scientists as to the consideration already fixed in favor of one of them in regard to a discovery.

Article 13 declares null and void all private agreements contrary to the provisions of the convention and aims at protecting employees ceding in advance their rights to employers.

The fourth part of the draft deals with rules of competence.

OBSERVATIONS ON THE COMMITTEE'S DRAFT

The draft adopted by the Committee of Experts constitutes a formal text open for public criticism.[34] Its authors took into account all the objections and criticisms brought out by the enquiries of the International Institute for Intellectual Coöperation.[35] The main defect of the draft is that of the definition of discoveries for which scientists' rights may be claimed. The terms "*susceptible d'une utilization matérielle*," "*contribuant à une production destinée au commerce*" and "*ayant pour conséquence des moyens nouveaux de production*" may apply to inventions patentable under the patent laws in existence in many countries or, broadly interpreted, may cover all scientific discoveries, however remotely connected with an industrial application. In the first case the whole system of patents would be disturbed, as inventors might prefer to be relieved from the stringent formalities and conditions of the patent law and rely for the protection of their rights on the new law on scientific discoveries.[36] In the second case, the charges on industry cannot be calculated with precision and the disputes on the right to claim a royalty would not be easy to solve. It is true that each country is free to delimit by its municipal law the exact boundaries of the new right. But the great diversity which may exist in this respect takes away all the benefit of an international convention. Professor Stolfi offers the following definition of scientific discovery: that which constitutes the unique, immediate and direct basis of an invention.[37] The word "unique" raises doubts, but the relation this definition establishes with inventions is most valuable. The scientific discovery which would give rise to a claim of royalty in favor of a scientist must have a direct and immediate relation to

[34] See Report on Scientific Property submitted on behalf of the Committee of Experts by Mr. Marcel Plaisant, International Committee on Intellectual Coöperation, Doc. A, 21, 1928, XII. A. I. Also Procès-Verbal Sous-Comité d'Experts pour la Propriété Scientifique C. I. C. I. 196 (communicated to the present writer by the courtesy of Mr. Weiss, Director of the Legal Section of the Institute), p. 2.

[35] Many of the changes from Mr. Ruffini's text adopted by the Committee of Experts had been proposed by Mr. Lyon-Caen, Permanent Secretary of the French *Académie des Sciences Morales et Politiques* on behalf of that academy and of the *Académie des Sciences* when he was heard by the Subcommittee on Intellectual Property at its meeting of Nov. 29, 1923. (See Committee on Intellectual Coöperation, Minutes of the Third Session, pp. 54–55.)

[36] See introductory statement of Mr. Ostertag, Director of the International Bureau, at the Rome Congress of the International Association for the Protection of Industrial Property, 1928, in *Propriété Industrielle*, 1928, pp. 178, 181.

[37] See his article on scientific property in *Propriété Industrielle*, 1928, p. 225.

an invention. It should make no difference whether the invention is patented or is merely applied industrially by a manufacturer.

As in the subject-matter of protection, in the rights and obligations of the parties and the other provisions the draft of the committee is too broad and indefinite. It is unfortunate that most of the members of this committee belonged to countries of the Latin group (ten Frenchmen, two Italians, one Belgian, one Swiss and one Spaniard), Germany, Great Britain, and the United States being each represented only by an industrialist. In the latter countries little support has been given to the idea of scientific property. Indeed, from the replies received by the Secretariat of the League of Nations,[38] the Institute for International Coöperation[39] and the standing committee on industrial property of the International Chamber of Commerce,[40] it appears that Belgium, Denmark, France, Hungary and, possibly, Switzerland are the only countries which are in favor of recognizing scientific property, while the other countries are either hostile or indifferent.

At the last two congresses of the International Association for the Protection of Industrial Property the consideration of the question of scientific property was postponed indefinitely.[41] The British, German, and Dutch representatives took a decidedly hostile position, not only towards the Ruffini plan of individual rights of scientists and individual obligations of users, but also to the Gariel scheme of rewards. The objections come usually from inventors and manufacturers who, naturally, do not wish to be tributary to scientists. Scientists have not shown much interest in the matter in all the countries. In other words, there is no pressure for the recognition of the new right by the persons primarily interested in most of the countries.

In France, where the pressure is great, the government has submitted to a commission of most eminent experts the project of a law adopting the principles of the above draft convention prepared by the Committee of Experts. An interesting provision of this project is the creation of special funds of insurance to which manufacturers and other users of scientific discoveries may contribute a premium and be insured against claims of scientists.[42]

The possibility of insurance as a method of application of the principle of scientific property without hindering the activity of the economic circles was suggested, among others, by the plenary committee on intellectual coöperation, in sending to the various governments the draft proposed by the Committee of Experts.[43] Users of scientific discoveries might transfer to benefit societies or insurance companies the obligations incurred by them on payment of an annual premium in proportion to the risks. Yet, the determina-

[38] Doc. A, 29, 1924, XII, and C, 217, M, 74, 1925, XII.
[39] See *supra*, note (32).
[40] International Chamber of Commerce, Synopsis of Replies No. 2366, 20, 10, 26.
[41] See *Propriété Industrielle*, 1927, p. 161, and 1928, p. 204.
[42] See on this Mr. Ostertag's statement in *Propriété Industrielle*, 1928, p. 181.
[43] See Doc. E, 37, 1928.

tion of the premium is not an easy matter when scientists of all countries may claim royalties.

Thus, in conclusion, desirable as the idea of an international convention may appear, its achievement does not seem possible. There are certain things on which international legislation may only intervene when thought in the various countries has become crystallized.[44] In the countries in which scientists press for recognition of their interests in the discoveries made by them and industrially applied by others, the law should give satisfaction to such interests, excluding scientists of other countries which do not afford a reciprocal protection. Such a law, tried and experimented with in such countries, may subsequently lead to similar enactments in other countries. The idea of an international convention may possibly be prosecuted only in countries which are prepared to legislate on the subject at the present time.

[44] See Hudson, "International Protection of Property in News," this JOURNAL, 1928, p. 385, 389.

LEGITIMATE TARGETS IN AËRIAL BOMBARDMENT

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The first non-stop flight to Europe was, perhaps, a victory for the cause of peace and international goodwill, but to those who have followed the developments in aërial warfare and the attempts which have been made in recent years to formulate rules for the conduct of belligerent operations in the air, this and successive flights come as a reminder of the still nebulous state of international air law.

The Geneva Disarmament Conference only last year demonstrated the difficulties which stand in the way of inducing nations to adopt restrictive measures in the field of national defense. Nations will not be bound by rules or ratios until they are satisfied that their security is adequate, and that other nations will not gain by their surrender of old rights or their assumption of new obligations. That governments are not over-enthusiastic toward restrictive international legislation is evidenced by the fact that seven years have passed since the conventions banning poison gas and the submarine as a commerce destroyer were signed at the Washington conference, and France has not yet ratified. Great Britain held herself bound not to confiscate merchant ships of the enemy found in her ports at the outbreak of war under the Sixth Hague Convention in the recent war, but not desiring to have her freedom of action restricted in the future by a rule which did not bind others, she has denounced it.[1] Lord Grey justly remarks in his memoirs,

> One lesson from the experience of the war is, that we should not bind ourselves to observe any rules of war, unless those who sign them with us undertake to uphold them by force, if need be, against an enemy who breaks them. . . . To bind ourselves by rules which we intend to keep and others intend to break is unreasonable so long as those who break them can do so with impunity.[2]

The United States, generally suspicious of all European peace moves since the World War, has not yet signed the Protocol of the Permanent Court of International Justice, although in 1926 the Senate voted to adhere thereto subject to five reservations. These reservations were not accepted by the signatories, who proposed modifications to which the Senate has not yet agreed.[3]

[1] The *London Times*, January 13, 1926.

[2] Viscount Grey of Fallodon, Twenty-five Years, Vol. II, p. 102.

[3] See Manley O. Hudson, "The American Reservations and the Permanent Court of International Justice," this Journal, Vol. 22, p. 776.

An integral part of the gloomy picture of future wars which even sober and thoughtful men paint for us is the fear of future developments in aërial warfare.[4] The distinguished authority on air power, Mr. J. M. Spaight, writes:

> The bombing of civilian objectives will be a primary operation of war carried out in an organized manner and with forces which will make the raids of 1914–1918 appear by comparison spasmodic and feeble. . . . The attacks on towns will be the war.[5]

Bearing in mind the refinements of barbarism practised in the last war, and realizing the possible extension of this method of wholesale slaughter in the next, jurists are asking themselves how this new instrument may be blunted.[6] Rear Admiral W. L. Rodgers, U. S. N., declares: "The thing at issue is that the new agency of warfare must not be so utilized as to carry out actions which are not in accordance with the general spirit of existing rules of warfare." [7]

International commissions draw up codes, but what confidence is there in their scrupulous observance? Elbridge Colby, captain in the United States Army, reflects the general skepticism when he writes: "The bombing will ostensibly be at military objectives." And further on in the same article, "We cannot put too much trust on rules." [8]

The only alternative to unrestricted bombardment, however, is bombardment limited by some rules, for it is inconceivable that such an efficient weapon as the aëroplane will ever be laid aside for humanitarian reasons. It is a question then of drafting suitable rules. If they are to commend themselves to observance by fighting men, they must be based as much on considerations of military expediency as upon considerations of humanity. Each rule must, therefore, be subjected to this double test, if it is to have any hope of being adopted, or of being followed when once adopted.

What should be the test for the legitimacy of an aërial target? The tendency even before the advent of the aëroplane was to increase the scope of permissible bombardment. The first international legislation on this

[4] Viscount Grey, *op. cit.*, Vol. II, p. 276, "War is the same word as it was a century ago, but it is no longer the same thing. It used to imply a contest between armies; it will henceforth, by common consent mean the destruction, by chemical agencies of the crowded centers of population; it will mean physical, moral, and economic ruin."

[5] J. M. Spaight, Air Power and War Rights, 1924, p. 12.

[6] John Bassett Moore, International Law: Some Current Illusions and Other Essays, p. 189.

[7] W. L. Rodgers, "The Laws of War Concerning Aviation and Radio," this JOURNAL, Vol. 17, p. 628.

[8] Elbridge Colby, "Aërial Law and War Targets," this JOURNAL, Vol. 19, p. 715.

Future conditions of warfare may invalidate any rules which at the time of their adoption may be pertinent enough. In the last war there was an attempt to apply the rules governing land and naval warfare to aircraft, for they were developed as branches of those services. This attempted assimilation failed. See "The Recent and Future Growth of Aërial Law," by H. D. Hazeltine in *Air* (July, 1918), Vol. II, p. 78.

subject, by the Brussels Conference of 1874, confirmed the customary law by declaring that fortified places alone could be besieged. Towns, agglomerations of houses or villages, which are open and undefended, cannot be attacked or bombarded.[9] The Hague rules of 1899 continued to protect undefended towns.[10] In 1907 the rules were so amended as to admit of the bombardment by naval forces of even open and undefended towns as regards military works.[11] This was the first intimation in modern international law that defense was inadequate as a criterion of legality for even surface bombardment, and that permissible bombardment should properly be related to the military significance of the target. This conclusion would be reached if aërial bombardment were assimilated to bombardment by land or naval forces, and the conclusion is inevitable when bombardment from the air is not so assimilated, but is treated rather as essentially a different instrumentality, and as raising very different problems.

As aviation developed, special rules were adopted to control it. The Hague Conference of 1899 adopted a convention which prohibited the dropping of bombs from balloons for a period of five years.[12] The rules relating to bombardment were amended in 1907 by adding the phrase, "by any means whatsoever," in order to include aërial bombardment [13] in the prohibition. At the same conference the subject of aërial bombardment was dealt with more specifically in the Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.[14] Ten nations signed this declaration, but the United States and Great Britain alone of the Great Powers have ratified it. Under this declaration the contracting Powers "agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." The declaration provides that it is to apply only in case of war between the contracting parties. This declaration is still in force.[15]

In the World War bombardment from the air began in a modest way. It consisted originally in dumping shells and explosives overboard from aëroplanes which lacked sighting devices, the cruising radius, and the high "ceiling" of the modern aëroplane. Bombing later was accomplished by different types of aëroplanes and with various designs of bombs to achieve

[9] Art. 15, *Actes de la Conférence de Bruxelles*, p. 299: this JOURNAL, Official Doc. Apr. 1907.

[10] Art. XXV of the Convention Respecting the Laws and Customs of War on Land.

[11] IX Hague Convention, Art. 2.

[12] Declaration No. 1, Hague Conference (1899). U. S. Foreign Relations (1899) p. 531. For the discussion relative to the adoption of this article, see Moore, Current Illusions and Other Essays, p. 193.

[13] Art. 25 of Hague Convention IV. "The attack or bombardment, by any means whatsoever, of undefended towns, villages, dwellings, or buildings, is forbidden."

[14] Declaration No. XIV, Hague Conference (1907). U. S. Foreign Relations (1907), Part 2, p. 1246.

[15] Moore, Current Illusions, *supra*, p. 241.

multiple purposes. The air service approximated the "zone fire" of artillery by attacking in formation, the various members of the squadron or flight releasing the bombs simultaneously upon a signal from the leader.[16] This method of bombardment in specified and concentrated geometric formations insured an even distribution of the projectiles over the ground.[17]

These developments in aviation and the increased power obtained thereby deprecate any attempt to prohibit bombardment entirely, and call for a revision of the orthodox concept of a legitimate target.

First, it is clear that in the future, defense as a test for the legitimacy of an air attack is entirely inadequate, for aside from the difficulty of answering with precision upon the old rules the question as to when a town is defended and when it is not defended, one will have to cope with a vastly augmented and almost ubiquitous air force which in a sense confers upon every town the distinction of being defended, and consequently of being destroyed.[18] Defense was an adequate criterion when the enemy attempted to capture, to force surrender, but it quite misses the point now that the enemy wishes simply to destroy.[19] The advisability, moreover, of placing anti-aircraft guns used to protect otherwise innocent towns against possible violations in the category of legitimate targets is seriously to be questioned.

Various theories have been advanced as to what should constitute the basis of legitimacy in air attacks, and with these we shall deal briefly. In the past war Germany seemed to accept the principle that bombing operations should be limited strictly to military areas, but her definition of the military area included places like London and Brighton, and excluded towns like Carlsruhe [20] and Stuttgart.[21] Great Britain and France adhered to the doctrine of the military objective, that is, bombardment of any object related with sufficient directness to military operations wherever found. A third theory has been advanced by Mr. J. M. Spaight, namely, that the air force should be permitted to attack the economic life of a belligerent country.[22] He suggests that the idea of war is to bring another nation to agreement on the terms you propose, and that in the past it had to be done by first fighting his agents, his armies, before you could strike at the principal. Now, on the contrary, there is the possibility of direct action. It is possible to send an air force against the really vital parts of a nation, its economic life rather than its military plumage. You can overlap the agents and strike at the principal by breaking the morale of the people who support

[16] *Bombardment*, published by the Air Service Tactical School, Langley Field, Va., (1926), pp. 50–51.

[17] *Conférence sur le Bombardement et L'Aviation de Bombardement*, Captain Dagnaux, of the *Centre d'Études de l'Aëronautique*, Versailles (1923).

[18] Hazeltine, *op. cit.*, p. 117.

[19] J. W. Garner, this JOURNAL, Vol. XVIII, p. 71.

[20] Poison gas factories, however, were located at Carlsruhe.

[21] J. M. Spaight, "Air Bombardment," British Year Book of International Law, p. 21.

[22] J. M. Spaight, Air Power and War Rights, pp. 12, 18.

the war as well as the industries which supply its materials. He says, "The doctrine of the military objective useful within its own limits, will be no adequate protection." [23]

The distinction between combatants and non-combatants, between property of a military character and property not of a military character, seems so fundamental that when the commission of jurists at The Hague in 1922–23 drew up a code governing aërial warfare they placed definitively within the category of illegitimate bombardment (1) the terrorizing of the civil population, (2) the destroying or damaging of private property not of a military character, (3) the injuring of non-combatants for enforcing payment of requisitions or contributions and (4) the bombing of buildings dedicated to public worship, art, sciences, or historic monuments.[24]

Bombardment would be legitimate, on the other hand, when directed at a "military objective," *i.e.*, the destruction of which would constitute a "distinct military advantage." [25]

Articles 22–26 of the Hague Rules of 1922–23 which deal with bombardment, are as follows:

ARTICLE 22

Aërial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.

ARTICLE 23

Aërial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

ARTICLE 24 [26]

(1) Aërial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; *factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.*

(3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. *In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bom-*

[23] J. M. Spaight, Air Power and Air Rights, p. 18.

[24] Articles 22, 23, 25, 26.

[25] Article 24. The term "military objective" was of British coinage, and appears nowhere in the American draft, which designated specifically what objects might or might not be bombed. The American delegation complained that a simple reliance upon this term left too much to the discretion of the individual commander. See J. B. Moore, *supra*, p. 194.

[26] The italics are my own.

bardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, *having regard to the danger thus caused to the civilian population.*

(5) A belligerent state is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

ARTICLE 25 [27]

In bombardment by aircraft, all necessary steps must be taken to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the red cross on a white ground, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white. A belligerent who desires to secure by right the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

ARTICLE 26

The following special rules are adopted for the purpose of enabling states to obtain more efficient protection for important historic monuments situated within their territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special régime for their inspection.

(1) A state shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall in time of war enjoy immunity from bombardment.

(2) The monument round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.

(3) The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 meters in width, measured from the circumference of the said area.

[27] Article 25 merely applies principles already recognized in codes of land and naval warfare to aërial bombardment. Article 27 of Land Warfare Regulations; 5 of the Naval Bombardment Convention.

Article 26 introduced two new features at the suggestion of the Italian delegates: (1) established a zone round each historic monument the area within which should not be used for military purposes, and (2) provided for a system of inspection under neutral auspices. The adoption of this system is only permissive.

(4) Marks clearly visible from the aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

(5) The marks on the monuments themselves will be those defined in Article 25. The marks employed for indicating the surrounding zones will be fixed by each state adopting the provisions of this article, and will be notified to the other Powers at the same time as the monuments and zones are notified.

(6) Any abusive use of the marks indicating the zones referred to in paragraph 5 will be regarded as an act of perfidy.

(7) A state adopting the provisions of this article must abstain from using the monument and the surrounding zone for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monument or zone any act with a military purpose in view.

(8) An inspection committee consisting of three neutral representatives accredited to the state adopting the provisions of this article, or their delegates, shall be appointed for the purpose of ensuring that no violation is committed of the provisions of paragraph 7. One of the members of the committee of inspection shall be the representative (or his delegate) of the state to which has been intrusted the interests of the opposing belligerent.

"Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes."[28]

Coupled with this doctrine of the military objective, we find a distinction drawn between cities, towns and villages in the immediate neighborhood of the operation of land forces and those not in such proximity.[29] In the one case they may be bombarded, "provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population."[30] In the other case bombardment is prohibited.

While we must expect in any event a discrepancy between precept and practice, the breach must be none the wider by reason of the looseness of language employed in drafting the code. Precision is the first requirement, and, therefore, it is the more regrettable that such an ambiguity as factories engaged in the manufacture of "distinctively military supplies" should occur. Who can say what are "distinctively military supplies" in war time when so much of the output of almost every factory producing anything from jam to steel goes to assist the conduct of military operations. No doubt this provision was designed to exclude jam factories and include woolen mills making army clothing, for example, but who shall say that meat is less important

[28] Art. 24, par. 2, Hague Rules, 1922.

[29] J. B. Moore, *op. cit.*, p. 195. The distinction occurs in the original American proposal.

[30] Art. 24, p. 4, Hague Rules, 1922.

to an army in the field than raiment, and why should aircraft be permitted to bomb one and not the other? At best, in distinguishing between factories it is possible to make only a distinction of degree and not of kind, and to an enemy airman who has not at hand the various contracts for military supplies there can be no practical difference. It is fatuous to suppose that he will trouble to make one, where none really exists. The enemy airman must be permitted to bomb all factories which contribute directly or indirectly to the conduct of the war, or the prohibition must include all but arms and munitions factories. The same liberty of interpretation is possible in the case of "lines of communication or transportation used for military purposes." What lines were not used for military purposes?[31] This provision does not even include the modest restraint which an "exclusively" or a "primarily" would recommend. This wording suggests a compromise between two opposing views, those who would legalize the bombing of railway lines and junctions anywhere, and those who would restrict it to the main arteries of military operations within or contiguous to the combat area. As it stands, it is a halfway measure, worse than useless, for it permits a belligerent to do under the guise of legality what he might otherwise scruple to do. It allows an interpretation which emasculates the whole series of prohibitions contained in the first part of the article.

Where an aërial attack upon a military objective would result in the indiscriminate bombardment of the civilian population it is declared unlawful.[32] The immediate consequence of the observance of this rule might well be that each belligerent would so locate his important military factories beneath the shelter provided by this paragraph that the air service would become impotent where it had once been strong. But it is inconceivable that nations which have come to regard the air service as a major means of attack will forego the advantages derived from their predominance in that respect, and ultimately any such prohibition must be disregarded. As Mr. Spaight points out: "A belligerent's right to bomb military objectives can not be prejudiced because his enemy locates them in such places that any attack upon them must involve incidental damage to innocent life and property in the vicinity."

The better rule would be frankly to allow the bombing of military objectives wherever found and under whatever conditions. This would encourage their isolation and would recognize in law what is already true in fact, that a state possessed of a strong air force will not spare a military objective in however densely populated a district if the need is sufficiently urgent. The difficulty is that if all factories producing materials useful in war are to be placed in a category of military objectives, any degree of isolation as regards a large number of them is practically out of the question.

Considerations of humanity dictate that only factories manufacturing

[31] Elbridge Colby, *op. cit.*, p. 706. J. M. Spaight, Air Power and War Rights, p. 227.
[32] Art. 24, par. 3, Hague Rules, 1922.

arms and munitions should be classed as military objectives, but on the other hand it is contended that such a restriction is out of line with what seems to be the trend of modern warfare as an economic as well as a military struggle. Inertia and the difficulty inherent in arriving at any international understanding on such a controversial subject will probably leave the question undecided until the next war. In the heat of a conflict, governments will then be called upon to decide, and it is not too hazardous a conjecture that inertia backed by military counsel and military necessity will prevail in favor of a rule which would permit the bombardment of any factory or of any of the sinews of industry. The only sanction mitigating the severity of the operation of such a rule would be the likelihood of reprisals. Once having defined "military objectives," it is submitted bombardment of them should be allowed wherever they may be located. Any other rule is unacceptable in theory and certain to manifest imperfections in practice.

Numerous further difficulties in the way of interpretation and performance stand in the way of the smooth working of this rule. Can a bomber always say beforehand whether or not his operations will result in the indiscriminate bombardment of the civilian population, especially if he must fire from a height of from ten thousand to fifteen thousand feet, which was the ordinary height in the last war? [33] It is a question decided only by the results, and depending upon the accuracy of the particular bomber. There is a further question as to how many innocent lives may be lost before a bombardment becomes indiscriminate. What is the proper proportion of people killed to the importance of a military objective? A pilot may not always be aware of the immediate proximity of a large civilian population; he may overestimate the accuracy of his aim or he may not intend to be accurate, and who shall judge of his intent? In view of the fact that intention is generally better than the results, as evidenced by mutual recriminations in the recent war, you cannot in any given case judge with certainty of the intent by the results. The tendency will be for each belligerent to become as convinced of the baseness of his enemies' intentions as of the purity of his own, and the bombed, being in the best position to judge of the damage done to innocent lives and property, may conceivably be goaded to indiscriminate bombardment by way of retaliation. For these reasons the second sentence of paragraph 3 of Article 24, prohibiting such aërial bombardment of military objectives as would result in the indiscriminate bombardment of the civilian population, should be omitted, and the bombardment of military objectives, properly defined, should be allowed wherever they may be found.[34]

The very crux of the problem therefore is, what shall be considered military objectives. To answer this question was outside the original scope of this article, and to suggest amendments to the code proposed by the

[33] Spaight, Air Power and War Rights, p. 222; *Bombardment*, published by The Air Service Tactical School, *supra*, p. 8.

[34] See C. C. Turner, The Struggle in the Air, p. 144.

Hague Commission of 1922–23 was even further removed from its purpose. But outlining a method still leaves undecided what it is more important to decide, namely, how far international law will restrict the usefulness of aircraft as instruments of war. In the absence of a body of customary law on this subject, how far international law will go depends on the willingness of the various states to accept the limitations which are recommended. If states generally are not willing to forego the use of advantages which they may be able to obtain from superiority in the air, then it is quixotic to draft a code which drastically curtails the operations of the aëroplane. How far governments are willing to go is a question of fact, which cannot be precisely answered. But in view of the use of aircraft in the World War, and the rapid strides which have been made in the years since the war, it is submitted that the prohibitions contained in these articles are too drastic, and the class of military objectives should be broadened.

The problem, therefore, is to delineate a way in which aircraft may operate most effectively, and still distinguish combatants and private property which assists in the conduct of the war from non-combatants and private property in general.

That a clear line of distinction cannot always be drawn will appear from the suggested amendments to the Hague Rules which follow. They are offered in all humility, and not with the hope that they may escape well-deserved criticism.

It is proposed to amend only Articles 22 and 24. In their revised form they are as follows:

ARTICLE 22

Aërial bombardment for the purpose of terrorizing the civilian populations; of destroying or damaging private property not in the class of military objectives as defined in Article 24, or of injuring non-combatants, is prohibited.

ARTICLE 24

(1) Aërial bombardment outside the combat area is legitimate only when directed at a military objective. Bombardment is legitimate wherever the military objective may be located, subject to the provisions of section 3 of this article.

(2) Such bombardment is legitimate only when directed exclusively at the following two classes of military objectives: (1) military forces; military works; military establishments or depots; factories engaged in the manufacture of arms or ammunition; lines of communication and transportation used primarily to transport armed forces, to convey supplies thereto or to communicate therewith: (2) factories engaged in the manufacture of materials which may be used in the conduct of the war; and all lines of communication or transportation not included in the first class of military objectives.

(3) Bombardment of military objectives of the first class is legal at all times. Bombardment of military objectives of the second class is legal only during the hours of the day between sunrise and sunset, and

throughout the night only when the objectives are located outside cities, towns, and villages.

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate, provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment.

(5) A belligerent state is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

The significant changes occur in the first three paragraphs of Article 24. The change in the first paragraph which would permit the bombardment of military objectives wherever found has already been dealt with at length.

In paragraph 2 military objectives have been divided into two classes. The first class contains what may be termed the traditional military objectives. The second class, in comprising factories engaged in the manufacture of materials which may be used in the conduct of the war, admittedly increases the ambit of legitimate bombardment. It is believed that in so doing it recognizes the inevitable trend of modern warfare, and the propensity of belligerents to regard the industrial sinews of a state as vital and sufficiently related to the military arm as to be properly subject to attack. But the essentially different nature of the two classes of objectives requires that they be treated separately. The third paragraph of Article 24 attempts to make this distinction. To include the ordinary factory producing war material under a government contract in the category of military objectives, and to declare that military objectives may be bombed wherever and whenever they may be found would be to license the general bombing of cities and towns. There would be serious danger of inaccuracy, if night bombardment of the second class of military objectives were allowed, and accuracy would not be promoted by the fire from anti-aircraft guns advantageously placed to ward off attacks on threatened areas. Enemy aircraft under fire must be allowed to reply, and no one is in a position to quarrel over the accuracy of their aim.

On the other hand, if day bombardment of manufacturing establishments is permitted, there is reasonable hope of accuracy, and the area endangered is correspondingly diminished even with "zone fire" by aëroplanes flying in formations. There is, of course, a very considerable residuum of risk of inaccurate or deliberately careless bombing. The rules as amended condone the killing of workers engaged in such factories as may be bombed. If this objection is raised, the only reply can be that it is no longer possible to distinguish at all times and as sharply between the men at the front and the workers in factories.[35] As military men are apt to view the problem, "fac-

[35] The only reason more factories were not bombed in the World War was that the comparatively small number of aircraft forced the belligerents to conserve their air power and to use what bombs they carried, in most cases, only against poison gas, chemical, and munitions

tories in economic wars, where the activity of industry plays a rôle of primary importance, are vital points for the country, and their armies, and efficient bombardments should considerably delay and often stop production of these factories."[36] We can only hope to secure protection against the terrorization of whole cities at night. There may, however, be greater protection in the case of the workers in factories than at first appears due to the necessarily spasmodic character of raids on factories, adequate warning, and aërial defense.[37]

This article, therefore, is redrafted in the hope of reconciling those who would restrict bombardment to the traditional military objectives and those who insist that indiscriminate bombardment is justified in the interest of the quicker termination of a war. The line of distinction may not be the proper one, but it is submitted that military objectives should be designated more precisely, that they may properly be divided into two or more classes, and that convenience and humanity will require that separate rules govern the bombardment of each class.

Almost seven years have passed since the Hague Rules were laid down by the Commission of Jurists, and five years have elapsed since somewhat similar rules were accepted by the International Law Association meeting at Stockholm, and no government has seen fit to adopt them. From this we must not deduce a low standard of international morality, or the utter futility of formulating any rules on the subject, but rather we should remember that international law waits upon usage, and usage is determined by the rules to which governments are willing to commit themselves in the actual conduct of war. The advantage of writing an aërial code in time of peace is that it may, perchance, be followed in time of war.

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factories. There were in all sixty raids on London, however, and the Zeppelins flew at such a height to escape anti-aircraft guns that the bombardment was extremely general and ineffective. Aëroplanes can fly much lower, and bomb with much greater accuracy than the Zeppelin.

[36] *Conférences sur le Bombardement et L'Aviation de Bombardement*, *supra*, p. 71. German steel manufacturers claimed a thirty per cent decrease in the efficiency of the workers during the period of air attacks on the Saar and Lorraine Luxembourg in 1916. See also *Bombardment*, published by The Air Service, *supra*, p. 63. "Industrial centers, especially those devoted to the manufacture of war material, are important strategical targets."

[37] Anti-aircraft defense at night is far more difficult. The difficulties of finding and aiming at aëroplanes during the night is out of all proportion to the advantage which the aëroplanes have. In the World War it took on the average of 1500 shots to put a single plane out of action. See "Aërial Bombing," by Major A. H. Hobley and H. B. Inglis, presented at the spring meeting, 1924, of the American Society of Mechanical Engineers.

IMMUNITY OF A FOREIGN MISSION'S PREMISES FROM LOCAL JURISDICTION

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During its session of October 31–December 2, 1927, the Hungarian-Czecho-Slovak Mixed Arbitral Tribunal established under the Treaty of Trainon[1] rendered several decisions condemning the Hungarian State to pay approximately five million Czech crowns indemnity on claims filed by Czecho-Slovak nationals in conformity with Article 232 of the Trianon Treaty.[2] In accordance with the provisions of the Peace Treaty[3], the Hungarian Government accepted without question these decisions of the Mixed Arbitral Tribunal.

However, because of certain arrangements concluded in 1924 between the Hungarian Government and the Reparation Commission, the former was not at liberty to make immediate payment of the awarded indemnities. In 1924 a loan of 250 million gold crowns (about 50 million dollars) had been issued to Hungary for the country's financial reconstruction, to be accomplished under the auspices of the League of Nations. The Reparation Commission, with a view to securing the country's financial equilibrium, had not only fixed the annual reparations payable by the Hungarian Treasury until the end of the reconstruction period in 1943, but had also prohibited any additional Hungarian payments whatsoever without the authorization of the Commission.[4]

[1] Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon, June 4th, 1920, Article 239: "Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established, between each of the Allied and Associated Powers on the one hand and Hungary on the other hand . . ."

[2] Article 232 of the Treaty of Trianon and the annex to that article deal with the questions of property rights and interests.

[3] Article 239, Paragraph (g): "The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive and to render them binding upon their nationals."

[4] After preliminary correspondence between the Hungarian Government and the League of Nations respectively on the one hand, and the Reparation Commission on the other, the Commission, in a decision of February 21st, 1924, excepted certain specified assets on Hungary's revenues and in a second decision bearing the same date, fixed the amount of treaty charges to be imposed upon Hungary. The decision (League of Nations Document, C. 583. M. 221. 1926. II, The Financial Reconstruction of Hungary, pp. 199–201) reads as follows:

"The Reparation Commission:

"*Considering* the present state of Hungarian finances;

"*Taking note* of the plan of the League of Nations for the financial reconstruction of Hungary transmitted to the Reparation Commission by the Hungarian Committee of the Coun-

In view of this arrangement, the Hungarian Government felt obligated to ask the Reparation Commission whether payment of the above-mentioned indemnities could be made over and above the sums fixed by the Commission on February 21st, 1924 as the annual reparations obligations of the Hungarian Treasury, or whether said payment must be included in these sums. Accordingly, on July 5th, 1928, the Hungarian Government communicated with the Reparation Commission requesting authorization to make payments in satisfaction of the Mixed Arbitral Tribunal's decisions and to charge such payments against the reparation annuity fixed by the Commission. An early reply was solicited, and the Reparation Commission was furthermore asked to indicate the item in the reparations annuity to which such payments could be debited. The Hungarian Government's memorandum also set forth the legal, political and financial considerations which made it desirable to fulfill as promptly as possible the obligations imposed by the arbitral decisions.

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cil of the League as the plan asked for in the resolution of the Commission of the 17th October 1923 and consisting of the Protocols Nos. I and II and the report of the Financial Committee of the League dated the 20th December 1923;

"*Considering also* that it is essential in the interests of Hungary and the States creditors of Hungary on reparation account that the projected loan to Hungary for financial reconstruction as contemplated by the said plan be adequately subscribed, but that it is not practicable before the date proposed for the issue of any such loan to determine the amount of the damage for which compensation is to be made by Hungary, to assign to her a part of the debt, and draw up a schedule of payments for securing and discharging the part so assigned pursuant to Article 163 of the Treaty of Trianon;

"*Recognizing further* that subscriptions to the said projected loan will be made upon the understanding that the recommendations as to the external obligations of Hungary, reparations and the powers of the Commissioner-General, contained in the said plan, receive the approval of the Reparation Commission and therefore, that the burden to be imposed under the Treaty of Trianon (other than such burdens, if any, as may arise under the said Treaty in respect of the obligations of Hungary or her nationals which existed before the Treaty) shall not for a period of twenty years from the date of this decision exceed the amounts mentioned in the Annex hereto and shall be subject to the conditions contained in the said plan;

"*And taking note* of the engagement of the Hungarian Government dated the 21st February 1924 consenting and agreeing to make the payment of the said amounts upon the dates prescribed:

"Decides that the payments and deliveries to be made by Hungary from the 1st January 1924 to the 31st December 1943 in respect of her liability to make reparation shall, in pursuance of the said plan and subject to the conditions contained therein, be those set out in the Annex hereto, but so that if, during the said period of twenty years, Hungary shall, with the approval of the Reparation Commission, make any payment or delivery under the said Treaty (not being a payment or delivery in respect of obligations of Hungary or her nationals which existed before the war, as for example, the obligations contained in Articles 186 and 231 and any such obligations as are contained in Article 232) otherwise than on account of reparation, such payment, or the value of any such delivery shall not exceed the figure fixed by the schedule for the period in which it takes place and shall be deducted from the obligations of Hungary fixed in the schedule for that period;

The Reparation Commission, for reasons unknown, delayed answering the Hungarian memorandum.

Among the Czecho-Slovak nationals in whose favor the arbitral decisions were rendered, was a firm which assigned its claim of 670,000 Czech crowns to a bank in Prague. Being impatient over the delay in payment, the assignee appealed to the Civil District Court at Prague under the Czecho-Slovak law of April 28, 1922,[5] which provided for the execution of arbitral decisions. The Court was asked to decree the forced sale of a building entered on the property-register as the property of the Hungarian State. This building was the Hungarian Legation.

The Civil District Court of Prague, and later, on appeal, the Superior Court, refused to comply with this request, stating that no judicial execution can be carried out against a foreign state. The claimant appealed against this decision of the Superior Court to the Supreme Court at Brünn. The Supreme Court in its judgment No. R. I. 305/28, rendered April 26th, 1928, reversed the decision of the lower courts.[6]

The reasons on which this reversal was based are of considerable interest.[7] The Supreme Court first proceeded to the interpretation of the

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"*And, further*, if the payments fixed in the schedule for the years 1927 to 1943 added to the value of the deliveries or payments made in the years 1924, 1925 and 1926 do not amount to 200,000,000 gold crowns, the deficiency shall be paid or delivered during 1940, 1941, 1942 and 1943 in addition to the payments or deliveries fixed for those years, one-fourth of the d eficiency being allotted to each year, and similarly, if those payments added to that value exceed 200,000,000 gold crowns, the excess shall in like manner be deducted from the payments or deliveries fixed for the same last years;

"*Provided also* and it is hereby declared that, if the Protocols I and II shall not have been duly signed by or on behalf of all the Governments named therein respectively on or before the 31st March 1924, or if, before the 31st December 1924, the League of Nations, taking into consideration the figure reached by the subscriptions to the said principal reconstruction loan, has not notified the Reparation Commission that it undertakes the responsibility to complete the reconstruction plan contained in the said protocols, this decision shall be void and of no effect.

"The Reparation Commission takes the decision upon the understanding that the Council of the League of Nations will declare before the 31st March next that it interprets Articles II and VII of the said Protocol II as meaning that it will, in conformity with the said plan of reconstruction, re-establish the control of Hungarian finances if and when it finds that any payment or delivery prescribed by the schedule to this decision has not been made pursuant to this decision, and this decision shall take effect only if the Council has made such a declaration before that date."

[5] 1922 *Sammlung der Gesetze und Verordnungen des čechoslovakischen Staates*, No. 146. The provisions of this law are considered in the discussion of the decision of the Supreme Court of Czecho-Slovakia, *infra*.

[6] The decision of the Supreme Court is reported in *Sbirka Rozhodnuti Nejvyssich Stolic Soudnich Republiky Ceskoslovenske*, 1928, pp. 632 *ff*. See also a comment by Giacinto Bosco, "*Lo stato attuale della questione dell' essecuzione degli Stati esteri dalla giurisdizione interna*", in 21 (1929) *Rivista di diritto internazionale*, pp. 35–62, at p. 48.

[7] The question of the right under Czecho-Slovak law to appeal in such a situation was fully discussed by the Court; this point is not considered here.

Czech law of April 28, 1922, to which reference has already been made. A casual reading of the law would lead to the supposition that it was designed to provide a legal method by which a Czech national could secure from the national treasury the sum awarded to him by the Mixed Arbitral Tribunal, and presumably paid to his government by the foreign state. The Court, however, held that such an interpretation would be repugnant to legal instinct and to common sense. It was believed that the state would scarcely order execution against itself when all that was needed was for it to pay the sum due out of the Treasury. The Court noted that the statute in question gave the awards of the international tribunals the same status and finality as the decisions of the national courts and made them subject to execution in the same way except that the Civil District Court at Prague was made the sole competent tribunal and certain forms had to be complied with when applying for execution. But the Court expressed the view that as far as execution of the arbitral awards against the Czecho-Slovak State was concerned, the whole matter was covered by the Peace Treaties (especially the last paragraph of Article 13 of the Trianon Treaty) which envisaged appropriate action by the Council of the League to induce compliance. The Court accordingly stated that the law must be interpreted in the light of the Peace Treaties, which require the contracting states to consider the decisions of the Mixed Arbitral Tribunal final and conclusive and to render them binding on their nationals. Thus the law of April 28, 1922 must be taken, in the opinion of the Court, as relating to execution against Czech nationals.[8]

The Court goes on to say that it might at first appear from this reasoning that execution under the statute should not be issued against a foreign state. However, the Court declares that is not necessarily true, but depends upon the object against which execution is sought. The legal basis for this step in the Court's argument does not appear. In the case at bar, execution was sought against real property situated within Czecho-Slovakia. The Court relies on one of its prior decisions [9] for the proposition that *immobilia obnoxia sunt territoriis*, a proposition which it declared rests upon international law and which leads to the conclusion that such property is subject to local jurisdiction regardless of the ownership thereof, whether the owner is national or alien, individual or sovereign.

So far the proposition finds support in general doctrine,[10] but the Court wholly ignored the further and essential fact in this case, namely, that the

[8] It may be remarked that it is difficult to imagine a situation in which a Mixed Arbitral Tribunal could render a decision against an individual rather than against the state, although under the terms of the peace treaties a decision may be rendered in favor of an individual.

[9] No. R. I. 120/27 of April 8, 1927.

[10] *See:* 10 (1883) *Journal du droit international privé*, pp. 67–68, and, in general, L. Van Praag, *Juridiction et droit international public*, The Hague, 1915, p. 402, and note 104. Also Storelli *v.* French Government, Civil Court of Rome, Feb. 13, 1924 in 17 (1925) *Rivista di diritto internazionale*, pp. 236 *ff.*

property was the Hungarian Legation. The Court decreed that execution could be issued against the property in question.

Before considering the question of international law raised by this disregard of the immunity of legation property, it may be useful to consider the subsequent history of the case. The Hungarian Government, through its minister at Prague, immediately protested against such action as being a gross violation of international law. As a result of this representation, the Czecho-Slovak Government temporarily suspended the execution of the judgment.

Moreover, in a later communication dated December 18th, 1928, the Reparation Commission informed the Hungarian Government that no payments on account of the decisions of the Mixed Arbitral Tribunal should be made above the annuities fixed for the reconstruction period ending in 1943. The Reparation Commission's note,[11] addressed to the Hungarian Minister in Paris, reads:

> Monsieur le Minstre,
>
> The Reparation Commission did not fail to give its most serious consideration to the letters which the Hungarian Government has addressed to it on July 5th and November 13th, 1928, concerning the charging of the amount of the condemnations pronounced against the Hungarian State by the Czecho-Slovak-Hungarian Mixed Arbitral Tribunal to the annuities fixed by its [the Reparation Commission's] decision of February 21st, 1924.
>
> It cannot but refer, with respect to this matter, to the communications made in its letter of June 28th, 1927, and has the honor to inform the Hungarian Government that it is not held to make any payments on account of the condemnations in question during and above these annuities.
>
> If, at a later date, the creditor Powers will consent to the Hungarian Government's effecting such payments on charge of any part of these annuities, the Reparation Commission shall have the honor of addressing a new communication on this matter to the Hungarian Government; until such a communication is addressed the Hungarian Government cannot consider itself authorized by the Commission to acquit the sum of these condemnations by charging them to the Reparation annuities.
>
> Please accept, Mons. le Ministre, the assurances of my high consideration.
>
> THE SECRETARY-GENERAL.
> (Signed) S. ARMITAGE-SMITH.

Meanwhile, a law which has direct bearing on the case was enacted by the Czecho-Slovak Parliament.[12] The law amends prior statutes relating

[11] MS. Reparation Commission. Secretary-General. No. 213/65. Translation from French original by the present writer.

[12] 1928 *Sammlung der Gesetze und Verordnungen des čechoslovakischen Staates*, pp. 123 *ff*. No. 23. *Gesetz vom 19 Januar 1928, betreffend die Abänderung und Ergänzung einiger Bestimmungen der Gesetze über das gerichtliche Verfahren in bürgerlichen Angelegenheiten und über das Exekutionsverfahren.*

to civil procedure and judicial execution. The last paragraph of its Article IV deals with execution against diplomatic agents and their property, stipulating that judicial execution against diplomatic agents and so-called exterritorial property can be undertaken only within the limits set by international law.[13]

It is interesting to note that the law was passed in January, 1928, three months before the decision of the Supreme Court, but did not go into effect, according to Article XX, § 1, until June, 1928, that is, three months after the Supreme Court handed down its decision. Thus, under the laws of Czecho-Slovakia itself, the instant case must be finally settled on the principles of international law.

The law relating to diplomatic privileges and immunities in general seems to be reasonably well settled and the League of Nations' Committee of Experts for the Progressive Codification of International Law considered it one of the few topics ripe for codification.[14] There can be no doubt that the immunity of the mission's building from local jurisdiction is an integral part of diplomatic privilege. Most legal authorities agree that no official of the state to which a foreign mission is accredited may enter the mission building or the envoy's residence without permission. This inviolability would also seem to protect such premises from any judicial execution. The immunity of domicile—the *franchise de l'hôtel*—has been well established for centuries, but the interpretation of this right has evolved with changing times until today it means something quite different from what it signified in the Middle Ages. Indeed a grasp of this evolution is essential in order to realize that arguments sometimes used to condemn the right of *franchise de l'hôtel*, are nowadays entirely groundless. In the Middle Ages a mission building was regarded as outside the territory of the receiving state, and extravagant claims of immunity were advanced not only for the mission buildings, but even for the territory surrounding them.[15]

These extreme assertions were, however, early abandoned, but the immunity of the legation building and the envoy's residence was upheld. The law of the middle eighteenth century, which considered the theory of

[13] Article IV of this law amends § 31, par. 1, of the law of May 27, 1896, relating to execution procedure, to read as follows:

"Against persons who enjoy exterritorial rights in the Czecho-Slovak Republic, and in exterritorial buildings and places, actions of execution can be undertaken so far only as is permitted by the law of nations. In doubtful cases the Court must request a declaration of the Minister of Justice, who shall give such declaration with the concurrence of the Minister of Foreign Affairs; such declaration is binding on the courts. Executions against exterritorial persons or in exterritorial buildings and places can be undertaken only in the presence of a representative of the Ministry of Foreign Affairs." [Translation by the present writer.]

[14] As to diplomatic immunities and privileges in general, see a study by the present writer, "Classification, Privileges and Immunities of Diplomatic Agents" in 1 (1927/28) Southern California Law Review, pp. 209 *ff.*, 332 *ff.*

[15] Butler-Maccoby, The Development of International Law, London, 1928, pp. 89 *ff.*

exterritoriality as the basis of diplomatic immunities was stated by Vattel as follows:

> The independence of the ambassador would be very imperfect and his inviolability very insecure if the house in which he dwells did not enjoy a complete immunity, and if it were not inaccessible to the ordinary officers of justice. The ambassador could be troubled under a thousand pretexts, his secrets might be discovered by a search of papers, and his person exposed to insult. All the reasons which demand his personal independence and inviolability concur thus in securing the immunity of his house. This privilege is universally accorded to ambassadors in civilized states; in all ordinary cases the ambassador's house, like his person, is regarded as being outside the territory.[16]

In contrast, at the end of the nineteenth century Bonfils, one of the most eminent of Continental writers, pointed out that the immunity of domicile need not be based on the fiction of exterritoriality, but is a consequence and application of the principle of independence and inviolability of the envoy's person. He further stated that writers are almost unanimous in admitting the principle of the *franchise de l'hôtel*.[17]

How can we explain the divergence between the views of the eighteenth century Vattel, who evidently based the immunity of domicile on the theory of exterritoriality, and that of Bonfils, who a century later rejected that theory as the basis of such immunity? The concept of exterritoriality resulted in the assertion of the right of asylum. The right to shelter fugitives from justice afforded ample opportunity for abuses, and it is not surprising that early attempts were made to abolish it. The opinion that the *franchise de l'hôtel* is not based on exterritoriality, which grew up in the nineteenth century, sought merely to deny, or at least, restrict, the right of asylum implicit in that fiction, but in no way suggested that a foreign mission's premises might henceforward be subjected to judicial execution. This view is moreover confirmed by contemporary authorities who, while opposing the right of asylum, nevertheless uphold the principle of immunity of domicile as stoutly as did medieval writers.

The late John W. Foster, whose treatise is undoubtedly one of the standard works on the practice of diplomacy, wrote:

[16] Vattel, The Law of Nations, 1758, Bk. IV., Ch. IX. § 117. The Ambassador's House and His Retinue (English translation by Charles G. Fenwick, in the Classics of International Law).

[17] H., Bonfils, *Manuel de droit international public.* Paris, 1894, p. 388., par. 695, "*Inviolabilité de l'hôtel*":

"La demeure du Ministre public doit être, en principe, à l'abri des investigations des magistrats, des préposés à la police locale, des employés des contributions ou des douanes. Nul ne doit, en règle générale, pouvoir y pénétrer sans autorisation expresse ou présumée. La *franchise* de l'hôtel de l'agent diplomatique est à la fois une conséquence et un mode d'applis application de son indépendance, de son invoilabilité personnelle.—Elle n'a pas pour base la fiction d'exterritorialité.—Mais, quel que soit la fondement sur lequel on l'assoie, tous, ou presque tous, les auteurs admettent le principe de la franchise de l'hôtel."

> As a diplomatic agent and his suite are free from legal process, so also his residence and office are free from local jurisdiction, those premises being held to possess certain ex-territorial qualities. They cannot be entered, or searched, under process of local law or by the local authorities.[18]

General Foster pointed out that immunity of domicile does not include the right to afford asylum to fugitives from criminal prosecution.

Sir Ernest Satow is very emphatic on this point:

> These immunities attach, no matter whether the house is the property of the agent's Government, or his own, or is merely rented by him . . . No officer of the State, and in particular no police-officer, tax-collector or officer of a court of law, can make his way into the house, nor, without the consent of the diplomatic agent, discharge any official function therein.[19]

Lawrence stated that:

> *Immunities connected with property* apply first and foremost to the official residence of the ambassador, usually called his *hotel.* It is generally regarded as inviolable except in cases of great extremity. . . . The other official property of the embassy shares the immunities of the hotel. *It may not be seized, distrained upon, or dealt with in any way, except in extreme cases of state necessity.*[20]

Professor Fenwick declares that, while the immunity of domicile was formerly more comprehensive, yet the present day restriction consists merely in denying the right of asylum. He wrote:

> The privileges conferred upon the public minister extend beyond his person to his official residence. . . . The immunity of his official residence, or domicile, known as *franchise de l'hôtel,* was formerly much more comprehensive than at present, and included a right of asylum now no longer recognized. At the present day the minister's domicile, including stables, outbuildings, carriages and automobiles, may not be entered by the local police or other officers of justice or administration in the ordinary exercise of their duties.[21]

Finally, in Oppenheim's latest edition, the following statement is found:

> The first of these privileges is immunity of domicile, the so-called *franchise de l'hôtel.* The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every respect considered to be outside the territory of the receiving States, and when this exterritoriality was, in many cases, even extended to the whole quarter of the town in which such a residence was situated. . . . Nowadays the official residences of envoys are, *in a*

[18] John W. Foster, The Practice of Diplomacy. New York, 1906, p. 165.

[19] Sir Ernest Satow, A Guide to Diplomatic Practice, 2d ed., London, 1922, Vol. I, Chap. XX, pp. 293 *ff*, "Immunities of the Residence of a Diplomatic Agent."

[20] Lawrence, The Principles of International Law, 7th ed., New York, 1923, par. 130. [Italics ours.]

[21] Charles G. Fenwick, International Law, New York, 1924, p. 364.

> *sense and in some respects only*, considered as though they were outside the territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys. *Therefore no act of jurisdiction or administration of the receiving Governments can take place within these residences, except by special permission of the envoys.*[22]

The opinion of writers upholding immunity of domicile is also confirmed in actual practice. The confiscation of the Palais de Venise, seat of the Austro-Hungarian Embassy to the Holy See, by a decree of the Italian Government dated August 25th, 1916, was severely criticized even in Italy, although it occurred as a measure of reprisal in the heat of war. On September 25th, 1916 the Papal Secretary of State issued a strong protest and Mr. George Scelle, Professor of International Law at Dijon, had to resort to casuistic arguments in his attempt to justify the action of the Italian Government.[23]

The immunity of domicile received signal recognition in the Covenant of the League of Nations, which provided in Article 7, Paragraph 5, that:

> The buildings and other property occupied by the League or its officials or by Representatives attending its meetings, shall be inviolable.

The Soviet Government in its Decree of June 30th, 1921, concerning diplomatic agents, provided in its Article 3 for the immunity of legation buildings.[24]

The draft-convention on diplomatic immunities prepared by the American Institute of International Law for codification of international law among the American Republics provides that:

> Diplomatic agents shall enjoy inviolability as to their person, *their residence, both private and official, and their property.*[25]

The immunity of domicile was particularly emphasized in Article 21 of the same Project, which provides that:

> No public, judicial or administrative officer of the country to which the agent is accredited may enter the domicile of the latter, or the legation, without the consent of the said agent."

The Pan-American draft, which certainly may be considered progressive, expressly denies the privilege of exterritoriality to the agent's private residence or the legation. According to Article 22, the envoy is obliged to sur-

[22] Oppenheim, International Law, 4th ed., by McNair, London, 1928, Vol. I, p. 629, par. 390. [Italics ours.]

[23] See the Italian Confiscatory Decree, the Papal Protest and Mr. Scelle's comments in 24 (1917) *Revue Général de Droit International Public*, pp. 244 *ff.*

[24] Fauchille, *Traité de droit international public*, 8th ed., Paris, 1926, Vol. I, pt. III, p. 75.

[25] SPECIAL SUPPLEMENT to this JOURNAL, Vol. 20, p. 353, Project No. 22 of the American Institute of International Law, Art. 19. [Italics ours.]

render to the local authorities any person who may have taken refuge in his house or in the legation. "Should the agent refuse to surrender him," the draft continues, "the local authority has the right to guard the house of the agent or of the legation until the government of the agent decides upon the attitude which he will take." Thus the Pan-American draft, although expressly denying the privilege of exterritoriality, only permits that the agent's residence or the mission's premises be *guarded*, and by no means suggests their being interfered with or entered, even in the pursuit of a criminal; much less would it sanction an entry for the fulfillment of a judicial execution.

In his report to the Committee of Experts on the Progressive Codification of International Law, Mr. Diena, as reporter of the 3rd Sub-Committee on Diplomatic Privileges and Immunities, pointed out that:

> In order to specify the prerogatives of diplomatic agents, it is, of course, necessary first of all to make mention of the inviolability which attaches more particularly to their person, *their official and private residence*, and correspondence and personal effects for the duration of their official mission in the country to which they are accredited.[26]

Among the answers to Mr. Diena's report sent to the League, by various governments, that of Switzerland, dated December 29th, 1926, deserves special consideration. Therein, the Swiss Government devoted a special chapter to the question of the inviolability of the premises of diplomatic missions. This answer pointed out that uncertainty concerning the immunity of domicile is due to misconceptions which have crept into international law in consequence of the theory of exterritoriality. It was stated, furthermore, that in practice the Swiss Government extends immunity to the envoy's private residence as well as the official mission premises. However, it was suggested that certain cases, such as an inspection by the fire-brigade, or the telegraph and wireless services, ought to be defined, wherein officials should not be refused admittance to mission buildings. The Swiss Government expressed doubts whether an execution upon diplomatic premises is permissible even when such are owned *privately* by a foreign government or by a mission's chief, and urged that this aspect of the immunity of domicile be studied.[27]

[26] League of Nations Documents C. 196. M. 70. 1927. V. p. 79.

[27] *Ibid.*, p. 243.

"The doubts which still subsist, as to the inviolability of diplomatic premises are largely due to the fact that these premises, like ships (floating territories), were long regarded as portions of foreign territory. In Article 9 of its Draft Regulations the Institute of International Law has clearly laid down that the "ex-territoriality" of diplomatic premises confers on the diplomatic representative merely the right to refuse admittance to officers of the public authority in the performance of their duty. If we take it that the basis of diplomatic prerogatives is the necessity of securing the independence of the Public Minister, we must admit that the rule embodied in Article 9 of the Draft-Regulations of the Institute of International Law—a rule which is observed in practice by the Swiss Government—is very reasonable. It might, however, be well to define certain cases in which an official should not be

In view of the fact that the case under consideration arose in Czecho-Slovakia, it will be appropriate to refer to that Government's answer to the Questionnaire sent out by the League. This answer, dated November 24th, 1926, contains the following statement:

> The inviolability of the official premises and of the diplomatic agents' private residence does not imply a right of asylum for a person threatened with criminal proceedings. . . . The building in which the legation is housed is subject like all other buildings to the police regulations regarding the safety of the inhabitants of the city, municipal health requirements, etc. Those regulations apply even in cases where the State represented is the owner. They also apply to the agent's private residence.[28]

The Czecho-Slovaks' answer seems to indicate the desire of that Government to subject the premises of a foreign mission to police regulations regarding the safety of the inhabitants, municipal health requirements, etc., but no indication can be found there that the Czecho-Slovak Government considered mission buildings subject to judicial execution.

It seems to be a generally accepted principle that the property of a foreign sovereign, whether a ship or building, movable or immovable property, is not subject to judicial execution, especially if it is owned in the sovereign's public capacity.[29] This principle must be upheld particularly if the property in question is a mission building, and it should be reiterated that the immunity of domicile in no way depends on the acceptance or rejection of the theory of exterritoriality. The principle of *franchise de l'hôtel* is, as we have seen, uniformly accepted in theory, and it seems that it is confirmed by judicial practice.

The Supreme Court of Austria was recently confronted with a problem similar to that faced by the Czecho-Slovak Supreme Court in the case under discussion. The Court was petitioned, on appeal, to attach a lien to an embassy building, as security for certain debts owed by the foreign state to plaintiff. However, the Austrian Supreme Court refused to comply with the request, holding that a mission building is inviolable under international law, and that therefore the attachment of a lien to a foreign embassy was inadmissible.[30]

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refused admittance to the inviolable premises of a diplomatic mission (*e.g.*, inspections by the fire brigade, technical inspections by officials of the telegraph and wireless service . . .).

"The current practice of the Swiss authorities is to extend inviolability to the private residence as well as the official premises. . . .

"Where the diplomatic premises are owned by the foreign Government, or by the head of the mission privately, the further question arises whether measures of execution (seizure or sequestration) are allowable. This is a particular aspect of the inviolability question which deserves consideration."

[28] League of Nations Documents C. 196, M. 70. 1927. V. p. 254.

[29] Charles H. Weston, Actions against the Property of Sovereigns, 32 (1918) Harvard Law Review, pp. 266 *ff.*

[30] 3 *Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil -und Justiceverwal-*

From the foregoing, it may be concluded that the Czech Supreme Court's decision issuing an execution upon the building of the Hungarian Legation in Prague was in clear violation of existing international law. No justification can be found either in theory or in practice for such interference with a foreign mission's premises by the authorities of the receiving state. It is fortunate that at the repeated intervention of the Hungarian Government, the Czecho-Slovak Government suspended the execution of the judgment of the Supreme Court of Brünn, but it is regrettable that the highest tribunal of any country should reach a conclusion so at variance with the principles of international law.

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tungssachen, p. 69. No. 32. Decision of March 15, 1921. Ob. III. 134./21. I Instance District Court for Civil Actions, Vienna, II. II Instance: Supreme Court, Vienna.

"The Court of I Instance, relying on a former decision confirmed by the Court of Appeals, granted, upon plaintiff's motion, the attachment of a lien to the Embassy-building in Vienna owned by the defendant, the Empire X, in order to guarantee plaintiff's claim. The Court of Appeals now rejected the motion for execution, invoking a declaration received from the Ministry of Justice to the effect that a Legation-building is inviolable in accordance with the usage of the law of nations and that the proposed attachment appears inadmissible under international law.

"The Supreme Court rejected plaintiff's motion for review:

"Motives:

"In the appellant's opinion the case and the circumstances do not warrant procuring information from the Ministry of Justice in accordance with Par. 3 of Art. XX of the *Einf. Ges. zur. J. N.* because the point at issue is not whether in the opinion of a person enjoying exterritorial rights the municipal courts have or have not jurisdiction or whether a person is entitled to enjoy exterritorial rights, but solely whether a lien can be attached to a legation-building. The Ministry of Justice is not at all competent to make a binding declaration on this question; its declaration is, moreover, erroneous because the legation-building as such is not immune from judicial execution, its inviolability meaning only that the ambassador and his staff shall not be prevented from using the legation.

"The appellant, however, overlooks the fact that the expression 'exterritorial person' in Par. 3 of Art. XX of the *Einf. Ges. zur J. N.* does not differentiate between a natural and a juristic person; therefore, in order to decide whether a declaration should have been procured from the Ministry of Justice as to the admissibility of a judicial execution on a legation-building, it was first of all essential to establish the ownership of the building. For, inasmuch as the legal status of a legation-building as such is tied up with the status of the owner, its fate is determined by the facts of ownership. Since here the property rights of the Empire X are without question and as the same, being a sovereign State, indisputably enjoys exterritoriality, the Court was certainly under obligation to procure a declaration from the Ministry of Justice on this doubtful matter in accordance with par. 3 of Art. XX of the *Einf. Ges. zur J. N.*, the admissibility of a judicial execution on the property of a sovereign State being at least questionable.

"It follows that by virtue of the express provision of the law this declaration was binding on the Court; and considering that it [the declaration] states unambiguously that the legation-buildings are, by the practice of the law of nations, inviolable and that, therefore, the application of a judicial execution to the case at bar appears to be inadmissible under international law, the motion to grant the attachment of a lien was rightfully rejected.

"Therefore the objection raised against the propriety of the Ministry of Justice's said declaration need not be considered, although they could not stand at bar, because according to

To be sure, the fact that Hungary's failure to comply promptly with the Mixed Arbitral Tribunal's decision was due to a prohibition imposed upon her by a ruling of the Reparation Commission, has no bearing whatsoever on the conclusion that the proposed judicial execution constitutes a serious violation of international law. The interference with the mission-building of a foreign sovereign state would be a violation of international law, even if it could be proved that that state failed to show due diligence in performing some international obligation. Here, Hungary's case is particularly strengthened by the circumstance that the Reparation Commission's ruling enjoining Hungary from acquitting her obligation was brought about with the concurrence of the Czecho-Slovak member of the Commission—a representative of that very state whose highest judicial tribunal pronounced a judgment which infringed upon a centuries-old principle of international law.

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the generally accepted principles of international law (Bar, II, p. 677; Vesque, p. 147; Loening, p. 132; also, Kohler, Laband, Meili, Seuffert), legation-buildings of a foreign sovereign state may not be the object of judicial execution." [Translation by the present writer.]

EDITORIAL COMMENT

THE NEW ARBITRATION TREATIES OF THE UNITED STATES

All American friends of arbitration will be gratified at the evidence of a marked revival of interest at the Department of State in the conclusion of treaties for the advancement of this method for the settlement of international differences.

By press releases issued by the Department up to May 31, 1929, it was announced that during the past year new arbitration treaties had been signed with the following countries: Albania, Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Ethiopia, Finland, France, Germany, Hungary, Italy, Lithuania, Luxemburg, Norway, Poland, Portugal, Rumania, Sweden and the Kingdom of the Serbs, Croats and Slovenes—twenty altogether. Some of these, notably those with Finland and France, have been ratified and proclaimed to be in effect. Negotiations were then in process for the conclusion of treaties of arbitration with China, Egypt, Estonia, Great Britain, Greece, Japan, Latvia, The Netherlands, Persia, Siam, Spain, Switzerland and Turkey. It was also announced by the Department up to that date that conciliation treaties had been ratified, signed, or in process of negotiation with twenty-two countries.

This altogether remarkable record constitutes a striking contrast with that of the somewhat long period that has elapsed since the conclusion of the last of the series of Root treaties. During that period apparently only two bilateral treaties of general arbitration were concluded between the United States and foreign powers: one with Sweden in 1924 and one with Liberia in 1926. There were, however, several special agreements for the arbitration of particular disputes, such as that with Norway relative to the requisition of Norwegian ships and shipbuilding contracts, the conventions of 1923 with Mexico for the settlement of certain claims between the two countries, and the agreement with the Netherlands for the settlement of the Isle of Palmas dispute. During this period also the United States became a party to the Pan American Multilateral Arbitration Treaty concluded at Santiago on May 3, 1923. But aside from the two relatively unimportant exceptions mentioned, the United States does not appear to have entered into any bilateral treaties of arbitration with other countries during this period.

Some of the new treaties concluded or now in process of negotiation are designed to replace corresponding treaties negotiated by Mr. Root, which have already expired or will expire at an early date. They are all identical in scope and character [1], although they differ in several respects from the

[1] Except that the treaty with France contains an additional article (Art. I) providing that any disputes of whatever nature they may be, not settled by diplomacy and not submitted to a competent tribunal shall be submitted for investigation and report as prescribed in the

Root treaties. In the first place, whereas most of the old treaties were concluded for a definite period, usually five years, at the expiration of which they were terminated, unless renewed, the new treaties, upon the exchange of ratification, "thereafter remain in force continuously unless and until terminated by one year's written notice given by either high contracting party to the other." In this respect they are an improvement upon the old treaties since they can be continued in force indefinitely, if the parties so desire, without the necessity of renewing them from time to time at relatively short intervals.

The scope of the new treaties is also somewhat different from that of the old ones—at least there is a difference of phraseology in the language by which the jurisdiction of the arbitral tribunal is defined. By the Root treaties the parties agreed to arbitrate "disputes of a legal nature and those relating to the interpretation of treaties." The corresponding language of the new treaties is "all differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of conciliation and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity."[2]

The language employed in the new treaties would seem to be intended to embrace, roughly speaking, all disputes which are strictly international in their scope and character and to exclude those which, like questions of immigration, custom tariffs and nationality, fall within the domestic jurisdiction of states and which acquire an international character only when they become subjects of international regulation, which are of such a nature as to

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treaty of Sept. 15, 1914 (one of the Bryan treaties), to the permanent international commission constituted pursuant thereto. In view of the language of Article III of the French treaty, doubt was raised in France as to whether the Bryan treaty had not been altered and its scope limited by the terms of the said article of the new treaty. In consequence of this uncertainty the French and American governments subsequently agreed by an exchange of notes to regard the Bryan treaty as not having been affected or modified by the new treaty. None of the other new treaties contain the equivalent of Art. I of the treaty with France for the linking up of the procedure of conciliation with that of arbitration, recourse to conciliation being provided for in separate treaties of conciliation.

[2] The language here employed is nearly identical with that of Art. I of the General Treaty of Inter-American Arbitration, signed at Washington on the 5th of January 1929, except that there is no reference in the latter treaty to disputes which have not been referred to a conciliation commission, that the word *juridical* is employed in the latter treaty in the place of *justiciable* and that the word *equity* does not appear in the Inter-American treaty as an element of the justiciability of a dispute. The coupling of the words "law and equity" in this connection is common in *general* arbitration treaties, those of Latin America as well as of Europe and the United States. See a list of such treaties in the award of the Anglo-American Mixed Claims Commission under the Agreement of August 18, 1910, Case of the Cayuga Indians, Nielsen's Report, pp. 315–319. The reason for the omission of the word "equity" from the Inter-American treaty is not known to the writer.

give rise to a right of one party to make a claim founded upon law, against the other party and which is capable of being adjudicated by a judicial tribunal by the application of principles of law or equity in the process of reaching a decision.[3] By the terms of the new treaties the parties agree to refer all such disputes, subject to the reservations discussed below, to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, *or to some other competent tribunal as the parties shall decide.* The alternative here provided for leaves the way open for recourse to the Permanent Court of International Justice instead of the old Court of Arbitration, in case both parties so desire and so agree. Various European and Latin American countries in their treaties with one another for the pacific settlement of international disputes have designated the latter court alone as the tribunal to which they will have recourse, but the United States is not a party to any such treaties. Whether it will in some future case agree to submit a dispute to the latter tribunal in preference to the former, remains to be seen. It is conceivable that a difference of opinion between the United States and the other party as to which of the two tribunals to which recourse shall be had may prevent an agreement to have recourse to either.

The new treaties like the old ones provide that the submission of the dispute to arbitration shall in each case be made by *special agreement* and on the part of the United States, by and with the advice and consent of the Senate. Each treaty therefore is merely an agreement to arbitrate when the Senate, two-thirds of its members concurring, is willing to consent to arbitration in a particular case and when the disputing parties are able to agree upon the particular tribunal to which the dispute shall be submitted. The decision whether a particular dispute falls within the terms of Article I of the treaty, or is excluded by the reservations of Article II, lies in the last analysis with the Senate, which means that one-third plus one of the senators may, if they are opposed, prevent recourse to arbitration. In this respect the new treaties fall short of the standards set by many treaties now in force among the countries of Europe and Latin America which provide for automatic submission of disputes to arbitration without the necessity of a special agreement in each particular case.

Let us turn now to the reservations which are a part of all the new treaties (Article III of the treaty with France; Article II of the others). This article reads as follows:

> "The provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which
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> (a) is within the domestic jurisdiction of either of the High Contracting Parties,

[3] As to the meaning of the term "equity" in international jurisprudence, see the awards in the Norwegian-American shipping arbitration case and that of the Cayuga Indians referred to above.

(b) involves the interests of third Parties,
(c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,
(e) depends upon or involves the observance of the obligations of ——— in accordance with the Covenant of the League of Nations."

The exclusion of differences involving domestic questions would seem to result from the terms of the preceding article which restricts the obligation to arbitrate, to "differences relating to international matters." But the express reservation of Article II was probably added out of superabundant caution. The reservation is unobjectionable and, as is well known, the principle is emboided in Article 15 of the Covenant of the League of Nations. The principle that each State shall be the sole and exclusive judge of the expediency of policies which are purely and admittedly domestic, is sound and incontestable. But grave differences may easily arise between the parties as to whether a particular dispute involves merely a domestic question or whether it is really an international one, as happened in the controversy between Great Britain and France relative to the Moroccan and Tunisian nationality decrees. The treaties provide no solution for the determination of this preliminary question of jurisdiction. In the event of such a dispute arising and the parties being unable to reach an agreement, each will remain its own judge as to whether the dispute is domestic or international in character. It can hardly be admitted that this is a satisfactory solution. It is one thing to recognize, as we must, the right of every sovereign state to determine freely its own domestic policies; it is a wholly different proposition to maintain that a state is the sole and exclusive judge of whether a particular policy or question is purely domestic, when it gives rise to an issue with another state whose rights are affected by such policy and which claims that it involves an "international matter." It is easily conceivable, in the absence of a common judge, that either party to a dispute if it wishes to evade its treaty obligation to arbitrate, may claim that the dispute is one involving a domestic policy, and from its decision there is no appeal. The line of demarcation between relationships which are domestic or national, and those which are international in their effect, is not clear and as the Permanent Court pointed out in its opinion in the case of the nationality decrees, it is one which is constantly shifting, in large part because the empire of international law is being rapidly extended and the conception of the domain of international relations is changing. Disputes involving controversies as to whether a particular act or policy falls within the domestic jurisdiction of a state are likely to be much more numerous in the future than they have been in the past and no system for the settlement of differences by arbitration or judicial process which does not provide a similar solution of this important jurisdictional question when it arises can be regarded as ideal.

The second reservation, that which excludes differences involving the interests of third parties, is found in the old treaties and in arbitration treaties generally. If this reservation means merely that the parties assume no obligation to arbitrate a dispute involving some other state's interests, it is of course unobjectionable. As is well known, the Permanent Court of International Justice declined to take jurisdiction of a request emanating from Finland and give an advisory opinion under a treaty (the Covenant of the League) to which Russia, a country interested in the dispute, was not a party and was unwilling to submit herself to the jurisdiction of the Court. In declining to take jurisdiction on account of Russia's refusal to give her consent, the Court said: "It is well established in international law that no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration, or to any other kind of pacific settlement" (Advisory Opinion No. 5). Manifestly if the United States and France were to agree to arbitrate a dispute involving a right or interest of Russia and should actually submit such dispute to arbitration, the award would not be binding on Russia. In this connection, reference may be made to the award of Victor Emmanuel, King of Italy, as arbitrator of a boundary dispute between Great Britain and Venezuela, attributing to Great Britain the territory in dispute. In his decision, the arbitrator stated very properly that the award could have no effect on the claim of Brazil to the same territory, since she was not a party to the arbitration agreement.[4] If the purpose of the reservation under discussion is to exclude from the arbitral obligation cases such as this, it rests on a sound principle both of international law and public policy. On the other hand, if the reservation should be interpreted to relieve the parties from an obligation to arbitrate a dispute between them in which some other state claims or actually has an interest, it is conceivable that it might be invoked by one of the parties to avoid its obligation to arbitrate. Japan, for example, might claim and really have an interest in a dispute between France and the United States, arising out of the interpretation of a treaty provision relative to naturalization or the rights of aliens, and either France or the United States, not wishing to submit the dispute to arbitration, might decline to do so on the ground that it involved the interests of a third state.[5] The analogous situation to which the fifth reservation of the United States Senate to the Permanent Court Protocol has given rise, will be recalled in this connection. It would seem reasonable to interpret the reservation in the present treaties as relieving the parties from an obligation to arbitrate the claims of other states, but as not relieving them from such obligation when a third state merely claims or even possesses an indirect interest in the outcome of the controversy, and when an award can be made without binding or affecting

[4] *Rev. Gén. de Droit Int. Pub.*, 1904, *Documents*, p. 18.

[5] Compare in this connection the observations of Jessup, International Conciliation, April, 1928 (No. 239), p. 208.

prejudicially the rights of a third state.[6] This appears to have been the view adopted by the Central American Court of Justice in the cases of Costa Rica *v.* Nicaragua and Salvador *v.* Nicaragua.[7]

The third reservation, that which excludes disputes depending upon or involving the Monroe Doctrine, although attached by the American delegation to their signature of the first and second Hague Conventions for the Pacific Settlement of International Disputes, and embodied in the conditions under which the Senate gave its advice and consent to the adherence of the United States to the Permanent Court Protocol, and impliedly to the Kellogg Pact, is a new one in bilateral treaties of arbitration between the United States and other countries.[8]

Considering the disposition in the United States since the close of the World War to revive the Monroe Doctrine which for some years prior to the war was apparently coming more and more to be regarded as obsolete, and to reassert its vitality through legislative and diplomatic channels, its appearance in the new arbitration treaties need cause little surprise. If European states are willing to enter into arbitration treaties with the United States which relieve the latter from an obligation to arbitrate disputes involving the Monroe Doctrine, it will afford further evidence of the disposition of Europe to leave the United States a free hand in the interpretation and application of the doctrine and to decide for itself controversies which in the opinion of the United States involve such policy.[9] If the Latin American Republics ratify the General Treaty of Inter-American Arbitration of January 5, 1929, with the understanding that the obligation to arbitrate "juridical" controversies only, relieves the United States from an obligation to

[6] The language employed in the General Treaty of Inter-American Arbitration of Jan. 5, 1929 (reservation b, Article II) might however be interpreted to exclude any dispute which merely affects, without involving directly, the interest of a third state. It reads: "Those [controversies] which *affect* the interest or *refer* to the action of a state not a party to this treaty."

[7] This JOURNAL, Vol. XI, pp. 212, 698.

[8] The reservation relative to the Monroe Doctrine, however, was omitted from the General Treaty of Inter-American Arbitration signed at Washington on January 5, 1929. But Dr. J. B. Scott (this JOURNAL, Jan. 1929, p. 146) appears to believe that the reservation (Art. II) of disputes which "affect the interest or refer to the action of a state not a party to the treaty" excludes from the obligation to arbitrate, disputes involving the action of non-American states contrary to what "the Monroe Doctrine is, or is conceived to be." Apparently also he is of the opinion that a dispute between the United States and a Latin American party involving the meaning of the Monroe Doctrine would be excluded by the terms of Article I which restricts the arbitral obligation to questions which are "juridical in their nature by reason of being susceptible of decision by the application of the principles of law."

[9] The treaties with France and Finland containing the reservation of the Monroe Doctrine have, as stated above, been ratified and proclaimed in force. But the outcome of negotiations for the conclusion of similar treaties with other countries, Great Britain and Japan, for example, is somewhat uncertain. Whether they will consent to become parties to treaties containing this reservation remains to be seen.

arbitrate any dispute which may arise between it and a Latin American State relative to the meaning and application of the Monroe Doctrine, and if they accept the Kellogg Pact with the "explanation" relative to the Monroe Doctrine submitted by the Senate Committee on Foreign Relations at the time the Senate gave its advice and consent to the ratification of the Pact, it will amount to acquiescence by Latin America in the view consistently maintained by the United States as to the unilateral character of the Monroe Doctrine and of its right to be the sole and final interpreter of the doctrine.[10]

Some will doubtless feel regret that the Monroe Doctrine, vague and "elusive in meaning" as it is today, now after the lapse of more than a hundred years, and after having accomplished the excellent purposes for which it was proclaimed by the illustrious President whose name it bears, should be revived and incorporated in our latest arbitration treaties. However, this feeling will lose much of its force if the treaties are freely entered into by the other parties with no misunderstanding as to the import of the reservations relative to the Monroe Doctrine.

The fourth and final reservation of the new treaties, that which exempts the parties which are Members of the League of Nations from the obligation to arbitrate any controversies involving the observance by them of their obligations under the Covenant of the League, would seem to be a natural if not a necessary one, since the Members of the League are bound by Article 20 of the Covenant not to enter into treaties which are incompatible with their League obligations.

In one respect the new treaties are believed to be an improvement upon the old ones. They omit the reservations in respect to the national honor, vital interests and independence of the parties—matters as to the existence of which each party was the final judge and which were susceptible of being so interpreted as to exclude from the obligation to arbitrate almost any controversy which one of the parties might wish to reserve. Unfortunately, however, the new reservations relating to questions of "domestic jurisdiction" and the Monroe Doctrine which take the place of those omitted, are by no means free from the same objection.

In other respects, notably as to necessity of a special agreement in advance of each recourse to arbitration, which agreement must receive the assent of

[10] The delegates of thirteen Latin American States at the Washington Conference on Conciliation and Arbitration, signed the General Treaty of Inter-American Arbitration with various reservations none of which, however, related to the Monroe Doctrine. This may have been due to the impression that nothing in the treaty could be interpreted as exempting the United States from an obligation to arbitrate disputes with Latin American States involving the interpretation and application of the Monroe Doctrine. Or it may have been due, on the other hand, to a willingness of the Latin American delegates to have such disputes withdrawn from arbitration, in accordance with the desire of the United States. It is not improbable that the acts of ratification on the part of both the United States and the Latin American parties may contain reservations or understandings as to the effect of the treaty on the Monroe Doctrine.

two-thirds of the Members of the United States Senate, the new treaties represent no advance upon the old ones. They of course fall far behind in their scope many of the recently concluded treaties among European States, under which the parties have agreed to settle by arbitration or recourse to the Permanent Court of International Justice *all* differences of whatever character which they are unable to settle by diplomacy or conciliation. The chief value of the new treaties consists in the evidence which they furnish of what would seem to be a revival of interest on the part of the United States in a limited form of arbitration as shown by its initiative in proposing new treaties, or renewing old ones, with the other countries of the world, after a rather long interval during which few treaties were entered into.

J. W. GARNER.

THE EFFECT OF WAR ON TREATIES

The recent unanimous decision of the Supreme Court, speaking through Mr. Justice Sutherland, in *Karnuth* v. *The United States** makes an interesting contribution to the vexed question of the effect of war upon treaties.

The case arose under the Immigration Act. Mary Cook, a British subject born in Scotland, and Antonio Danelon, a native of Italy who claimed Canadian citizenship, sought and were denied admission to the United States and sued out habeas corpus proceedings in the Western District of New York. Both petitioners lived on the Canadian side of the border and had been employed in the United States, crossing the border daily to go to work. On the particular occasion when admission was refused, Mary Cook was looking for employment while Danelon was returning to his regular work. The District Court sustained the ruling of the immigration officials denying admission. On appeal to the Circuit Court of Appeals this ruling was reversed, but on certiorari to the Supreme Court the judgment of the Circuit Court of Appeals was in its turn reversed and the action of the immigration authorities and the District Court sustained.

The case involves two main questions; one as to the proper construction of the term "immigrant" [1] in the immigration law, the other as to the effect of the War of 1812 upon the Jay Treaty of 1794.

(1) The first question, while of great practical importance, is of relatively small legal interest. Section 3 of the Immigration Law provides that:

> When used in this Act the term "immigrant" means any alien departing from any place outside of the United States destined for the United States except . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure.

The Circuit Court of Appeals held that an alien crossing the border either to seek employment or to perform a daily task was visiting the United

* Printed in this JOURNAL, p. 645.

[1] Neither alien being "born in the Dominion of Canada," neither could qualify as a "non-quota immigrant" under Sec. 4 (c) of the Act.

States temporarily for business and therefore was not an immigrant within the meaning of the Act. In reaching this conclusion the Circuit Court of Appeals relied to a considerable extent upon the dictionary conception of the word "immigrant" as a person who removes to a country for the purpose of permanent residence. Further the Circuit Court of Appeals appeared to be influenced by the argument that if petitioners and others similarly situated should be held to be immigrants within the meaning of the Act, the Immigration Law would be inconsistent with the Jay Treaty with Great Britain.

The Supreme Court of the United States on the other hand held that "the act makes its own definition" of the term "immigrant" irrespective of the ordinary definition of the word; that petitioners are squarely within the statutory definition unless they fall within the second exception; that as to this the word "business" is one of "flexibility" depending "upon the context or upon the purposes of the legislation," and in view of the fact that one of the great purposes of the Immigration Law was to protect American labor, as disclosed by the history of the legislation before Congress, the word "business" was not intended to cover "ordinary work for hire" but "must be limited in application to intercourse of a commercial character," hence petitioners were immigrants within the meaning of the Immigration Law. As to the provision of Article 3 of the Jay Treaty upon which the Circuit Court of Appeals relied, the Supreme Court had already held in the first part of its opinion that the provision in question "belongs to the class of treaties which does not survive war between the high contracting parties," and had therefore been annulled by the War of 1812.

The provision in question reads as follows:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. . . .

(2) The opinion and decision of the Supreme Court in so far as it relates to the second question, *viz.*, the effect of war upon treaties, is of general interest to students of international law. It is of special interest because the courts both of Great Britain and the United States had already had the same question before them as respects Article 9 of the Jay Treaty [2] and had held in general terms, but of course with direct reference to the questions of title to real property dealt with in Article 9, that the treaty provisions were not affected by the War of 1812.

[2] Society, etc. *v.* New Haven, 8 Wheat. 464, 491; Sutton *v.* Sutton, 1 Russ, & M. 663, 675. Judge Washington's opinion on this point in Society *v.* New Haven, however, although perhaps not in strictness a dictum only, was, apparently, in the view of the court, not necessary for the decision of the case.

The question whether or not Article 3, in so far as it related to the right of passage across the border secured to the Indians, had been annulled by the War of 1812 had been before the lower Federal Courts [3] which had held in substance that the Indian right of passage was anterior to the treaty and remained unaffected by both the treaty and the war, and thereafter Congress had passed a special statute providing that the Immigration Act should not be construed "to apply to the right of American Indians born in Canada to pass the borders of the United States," with a proviso that this right should not extend to persons adopted into Indian tribes.[4]

The question of the effect of the War of 1812 on the Jay Treaty had also been the subject of two inconclusive and apparently inconsistent expressions by the Department of State in domestic communications.[5]

The Circuit Court of Appeals had apparently regarded the decisions of the Supreme Court and of the British Courts in regard to Article 9 as sustaining the general proposition that the Jay Treaty was not annulled by the War of 1812 and therefore as controlling with respect to Article 3, but the Supreme Court holds that Article 9 and Article 3 "relate to fundamentally different things. Article 9 aims at perpetuity and deals with existing rights vested and permanent in character" while "the privilege accorded by Article 3 is one created by the Treaty having no obligatory existence apart from that instrument. . . . It is in no sense a vested right . . . It is not permanent in its nature. It is wholly promissory and prospective." It is necessarily suspended by war and might also "be incompatible with conditions following the termination of war."

The Supreme Court assumes the severability of Article 9 and Article 3,[6] and addresses itself to developing the modern doctrine classifying treaty stipulations according to their character and to the task of establishing the ephemeral character of the provision of Article 3 of the Jay Treaty providing for free passage. It is interesting to note that the court in its citation of authorities relies first of all upon Hall's work on International Law and therefore the decision is an addition to the long list of approving judicial annota-

[3] U. S. *ex rel.* Diabo *v.* McCandless, 18 F. (2nd) 282; McCandless, Commissioner of Immigration *v.* Diabo, 25 F. (2nd) 71.

[4] Act of April 2, 1928, 45 Statutes 201, 308, cited, Brief of the United States in Karnuth *v.* U. S. 27.

[5] Secretary Bayard to Messrs. L. and E. Lehman, June 23, 1885, 156 MS. Dom. Let. 80, Moore: Int. Law Digest, Vol. V, p. 374; Memorandum of the Acting Secretary of State to the Senate, March 27, 1919, cited, Brief of the United States in Karnuth *v.* U. S., p. 42.

[6] The Brief of the United States (p. 29) cites the following pertinent passage from Wheaton on this point: "Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the [well] being of either party, and thus render the compact inapplicable to the new condition of things." (Wheaton, Elements of International Law [Lawrence's 6th Ed.,] p. 343).

tions of Hall's great text. The court holds that the provision in question was annulled by the War of 1812.

The decision is, of course, so far as its legal effects go, confined to the particular provision before the court. It would seem, however, that similar considerations would apply to the remaining provisions of Article 3, as well as to Article 1 of the treaty. Article 2 and Articles 4 to 7 have been carried into effect. Article 9 stands by virtue of the judicial decisions heretofore noticed and Article 10 which makes express provision for time of war would under all the authorities not be annulled by war. The remaining articles of the treaty appear to have expired by limitation.[7] The conjecture is hazarded, therefore, that the principles enunciated in the decision leave no part of the Jay Treaty in force except Articles 9 and 10, but it is submitted that the accuracy of this conjecture would be an appropriate subject of study for those charged with the preparation of the annotated scholarly edition of the Treaties of the United States which recent appropriations of Congress, in response to recommendations of the Department of State at the suggestion of the Third Conference of Teachers of International Law and the American Society of International Law allow us to hope will appear in the not too distant future.

WILLIAM C. DENNIS.

THE TACNA-ARICA SETTLEMENT

By notes dated May 15 and 16, 1929, Chile and Peru have respectively accepted the proposals of President Hoover made to both countries as a basis of a settlement of the long-standing Tacna-Arica controversy.[1] The proposals suggest among other things that Tacna province shall go to Peru and Arica province to Chile, the dividing line to be marked by a commission of engineers; that a wharf, custom house and railroad station to be constructed by Chile shall be given to Peru in the port of Arica which shall be a free port to her; that Chile shall pay six millions of dollars to Peru and deliver to her without cost all public works and public property in Tacna province. The two countries reciprocally waive all obligations and debts between them. It appears that the settlement would leave the Arica-La Paz railroad wholly within Chilean territory.

In transmitting the proposals, the President was careful to point out that he was acting "not as Arbitrator but in the exercise of good offices at the request of the parties." This presumably leaves the fruitless arbitration

[7] As the court points out, the reference in Article 28 to the first ten articles as "permanent," which is noted in the opinion of the Circuit Court of Appeals, was merely intended to differentiate them from the subsequent articles which were of expressly limited duration. It has no bearing upon the question before the court, *viz.*, the effect of war upon the treaty.

[1] See SUPPLEMENT to this JOURNAL, pp. 183–7.

proceeding where it stood when the Plebiscitary Commission broke up in Arica on June 14, 1926. The President was also impelled to state that his action was not to be taken as an expression of any opinion or view or suggestion regarding the future disposition of the territories by either party. This doubtless refers to the Bolivian aspiration for an outlet to the sea through these territories, which has received the consideration of the countries concerned. It is noteworthy that the restriction occurring in former discussions, that the territories should never be ceded to a third power, is omitted from these proposals.

The Tacna-Arica question arose out of the War of the Pacific which broke out in 1879 between the Republic of Chile on the one hand and the Republics of Peru and Bolivia, allies under a secret treaty of February 6, 1873, on the other hand. Chile was the victor and at the conclusion of the war she was in occupation of the littoral of Bolivia and Peru and also of the City of Lima, the capital of the latter country. A treaty of peace between Chile and Peru was signed at Ancon, October 20, 1883, known as the "Treaty of Ancon" and ratifications were exchanged March 28, 1884. On April 4, 1884, Chile and Bolivia entered into a truce agreement which was finally replaced by a treaty of peace whose signature was delayed until October 20, 1904. The loss of extensive and important territories went hard with the defeated allies who had expected a quite different result.

The present controversy arose out of Article III of the Treaty of Ancon which reads as follows:

> Article III. The territory of the provinces of Tacna and Arica, bounded on the north by the river Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south by the ravine and river Camarones, on the east by the Republic of Bolivia, and on the west by the Pacific Ocean, shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years, to be reckoned from the date of the ratification of the present treaty of peace.
>
> After the expiration of that term a plebiscitum will decide by popular vote whether the territories of the above-mentioned provinces will remain definitely under the dominion and sovereignty of Chile or continue to form part of Peru. Either of the two countries to which the provinces of Tacna and Arica may remain annexed, will pay to the other ten millions of Chile silver dollars or Peruvian soles of the same weight and fineness.
>
> A special protocol, which will be considered as an integral portion of the present treaty, will prescribe the manner in which the plebiscitum is to be carried out, and the terms and time for the payment of the ten millions by the nation which may remain in possession of the provinces of Tacna and Arica."[2]

This article provides for a special protocol to be considered an integral part of the treaty, which shall prescribe the manner in which the plebiscite is to be

[2] This translation is taken from the *Foreign Relations of the United States*, 1883, p. 731.

carried out and the terms and time for the payment of ten millions to the country unsuccessful in the plebiscite. The negotiations for this special protocol began shortly before the expiration of the ten year period mentioned in Article III, and continued at intervals between the two countries up to 1922, without any final agreement having been reached.

In January, 1922, Mr. Hughes, Secretary of State of the United States, instructed the American Ambassadors to Chile and Peru respectively to transmit to the governments to which they were accredited an invitation for a conference in Washington for the purpose of finding a way to end this long-standing controversy. The invitation to Chile read as follows:

> The Government of the United States, through the courtesy of the Ambassadors of Peru and Chile in Washington, has been kept informed of the progress of their negotiations carried on directly by telegraph between the two Governments of Peru and Chile looking toward a settlement of the long standing controversy with respect to the unfulfilled provisions of the Treaty of Ancon. It has noted with the greatest pleasure and satisfaction, the lofty spirit of conciliation which has animated the two Governments, and that as a result of these direct exchanges of views the idea of arbitration of the pending difficulties is acceptable in principle to both. It has also taken note of the suggestion that the representatives of the two Governments be named to meet in Washington with a view to finding the means of settling the difficulties which have divided the two countries.
>
> Desiring in the interest of American peace and concord to assist in a manner agreeable to both Governments concerned in finding a way to end this long-standing controversy, the President of the United States would be pleased to welcome in Washington the representatives which the Government of Peru and Chile may see fit to appoint to the end that such representatives may settle, if happily it may be, the existing difficulties or may arrange for the settlement of them by arbitration.

This invitation was accepted by Chile and Peru and their duly accredited representatives were sent to Washington where negotiations for a settlement were carried on from May 15 to June 20, 1922. On the latter date the plenipotentiaries of the two countries signed a Protocol and Supplementary Agreement submitting the controversy to arbitration. The essential articles of the protocol are the following:

> Article 1. It is hereby recorded that the only difficulties arising out of the Treaty of Peace, regarding which the two countries have not been able to reach an agreement are the questions arising out of the unfulfilled stipulations of Article III of said Treaty.
>
> Article 2. The difficulties referred to in the preceding article will be submitted to the arbitration of the President of the United States of America who shall decide them without appeal after hearing the parties and taking into consideration the arguments and evidence which they may present. The times and procedure shall be determined by the arbitrator.

The Supplementary Agreement of the same date which was "an integral part of the Protocol" reads as follows:

In order to determine with precision the scope of the arbitration provided for in Article 2 of the Protocol signed on this date, the undersigned agree to place on record hereby the following points:

First. The following question, raised by Peru at the session of the Conference held on May 27th last, is included in the arbitration:

"For the purpose of determining the manner in which the stipulations of Article III of the Treaty of Ancon shall be fulfilled there shall be submitted to arbitration the question whether, in the present circumstances, the plebiscite shall or shall not be held."

The Government of Chile, on its part, may present to the arbitrator all the arguments that it may deem necessary to its case.

Second. In case that it is decided that the plebiscite shall be held, the arbitrator is empowered to determine the conditions under which it shall be held.

Third. If the arbitrator should decide that the plebiscite shall not be held, both parties, at the request of either of them, shall discuss the situation created by this decision.

It is understood, in the interest of peace and good order, that, in this event, and pending an agreement as to the disposition of the territory, the administrative organization of the provinces shall not be disturbed.

Fourth. The two Governments shall solicit, in case that they should not reach an agreement, the good offices of the Government of the United States of America, in order that an agreement may be reached.

Fifth. The pending claims regarding Tarata and Chilcaya likewise are included in the arbitration, subject to the determination of the final fate of the territory to which Article III of the said Treaty refers.

This Act is an integral part of the Protocol to which it refers.

This Protocol and Supplementary Agreement were ratified by Chile and Peru and ratifications were exchanged in Washington, January 15, 1923.

On January 16, 1923, the Ambassadors of Chile and Peru at Washington requested the President of the United States to accept the office of Arbitrator, and on January 29 the Secretary of State transmitted to the Ambassadors the President's acceptance of the office of Arbitrator.

Thereupon the Ambassadors of Chile and Peru agreed, March 2, 1923, upon the periods within which the cases and counter-cases in the arbitration and the documents relied upon should be presented to the Arbitrator and advised the Secretary of State of this agreement.

After consideration of the cases, counter-cases and documents submitted the President, Calvin Coolidge, rendered an award on March 4, 1925. In brief the Arbitrator held that a plebiscite should be held and laid down the conditions of holding the plebiscite, including the qualifications of voters, supervision by a plebiscitary commission of three members, one to be appointed by each country and other details. The award also provided for the payment of ten millions and determined the disputed points of the northern and southern boundaries of the provinces.

Under the terms of the award the plebiscitary commission, headed by General Pershing, assembled at Arica and held its first regular meeting there on August 5, 1925. The Commission continued its trying sessions until

June 14, 1926, when by a resolution voted by General Lassiter (who had succeeded General Pershing) and the Peruvian member, the plebiscitary proceedings were terminated on the ground that "a free and fair plebiscite as required by the award is impracticable of accomplishment."[3]

After the termination of the plebiscitary proceedings, both countries made formal statements of the legal positions claimed by them as a result of the so-called Lassiter Resolution of June 14, 1926.

Thus, in the summer of 1926, the Tacna-Arica problem was still unsettled with the Secretary of State continuing to listen to suggestions from both sides and to act as friendly adviser of both parties. After consideration of their respective viewpoints, Mr. Kellogg, who had entered upon his duties as Secretary of State just after the Arbitrator's award, presented to Chile and Peru a formal statement of his views in a memorandum dated November 30, 1926. He stated that there were only three possible solutions of the controversy, namely, (1) assigning all of the territory to one of the contestants, (2) dividing the territory between them, (3) giving neither contestant any of the territory. Mr. Kellogg regarded the first two possibilities as impracticable of accomplishment in the existing situation in as much as neither country was in a position to make the necessary concessions involved in either method of settlement. He therefore suggested, as a settlement under the third solution, that Chile and Peru cede their rights in the territories to Bolivia upon certain conditions.[4]

On December 4, 1927, Chile answered Mr. Kellogg's proposal agreeing to consider it in principle, but suggesting, among other conditions, that a treaty of commerce and relations be negotiated with Bolivia, that the territories be forever demilitarized, and that the transfer of any part of the territory to any other power be prohibited.

On January 12, 1927, Peru replied at length to the Kellogg proposal, claiming complete ownership and dominion over the territories, owing to the failure of the plebiscite, and declining the proposal which "far from simplifying the solution, complicated it." Peru however, favored neutralization of the territories and the division of them by giving her the Province of Tacna and port of Arica and "making a division of the rest of the Province of Arica between Bolivia and Chile to the south of Azapa."[5]

Still undiscouraged, Mr. Kellogg continued to use good offices from another angle. Chile and Peru since 1910 had had no diplomatic relations, but through Mr. Kellogg's influence they agreed, in July, 1928, to exchange diplomatic agents. This was done in the summer or fall of that year and the two countries were thus enabled to discuss directly a settlement of the Tacna-Arica controversy. Apparently direct agreements were reached between the two countries on nearly all of the outstanding questions except on the

[3] This JOURNAL, Vol. 20, 1926, pp. 624–5.
[4] SUPPLEMENT to this JOURNAL, Vol. 21, 1927, p. 11.
[5] *Ibid.*, p. 43.

matter of a projected port for Peru in the Province of Tacna at Las Yaradas, a point to the north of the harbor of Arica. The differences of view on this matter were referred to President Hoover, and it seems that the provision for Peru in the port of Arica overcame the difficulty and made a port at Las Yaradas unnecessary.

It is not stated to what extent the Secretary of State took part by way of good offices in bringing about an agreement on the final bases, but it is fair to assume that the usual course of diplomacy was followed and that therefore he was advised of and consulted regarding the progress of the negotiations as they proceeded to the settlement. No doubt this entailed tedious negotiations between the parties before reaching the cut and dried proposal made by President Hoover, which was so promptly accepted by Chile and Peru.

The Hoover proposals have been put into a formal treaty, which has been signed by Chile and Peru and now awaits confirmation by their respective legislatures. Thus the Tacna-Arica problem, after the vicissitudes of forty-five years of diplomacy, is about to pass into history. Putting aside all controversial questions and in the spirit of good will, let us hope that in this settlement Chile and Peru will find the road to justice and peace.

L. H. WOOLSEY.

THE FEDERAL TORT CLAIMS BILL

On March 2, 1929, the House of Representatives and the Senate of the United States, after a conference report, agreed upon the terms of a bill (H. R. 9285, 70th Cong., 2d sess.) granting authority for the "adjudication and payment of claims" for damage to private property up to $50,000 caused by the "negligent or wrongful act or omission of any officer or employee of the Government within the scope of his office or employment, and not out of contract." In the case of personal injuries or injury resulting in death, a limit of liability of $7,500 was provided for. The procedure for asserting the claim is by claim or petition addressed to the General Accounting Office of the Comptroller General, which may "settle and adjust" the claim, with review by certiorari to the Court of Claims; but Congress reserves its privilege, before making an appropriation, to consider the report and finding of the Comptroller General and to reject it, and to refer the matter back for further examination and report. In the case of personal injury, the United States Employees' Compensation Commission is empowered to consider the claim and make report and recommendation to the General Accounting Office "for audit and settlement." No judicial review is provided for, although Congress reserves its privilege to examine the evidence and reject the settlement if it desires.

The bill excludes from the subject-matter of liability any claim arising out

of the loss or miscarriage of mail matter, any claim arising out of the assessment or collection of taxes, claims under the Suits in Admiralty Acts of 1920 and 1925, claims arising out of the administration of the office of Alien Property Custodian, claims arising out of the administration of the quarantine laws, except the laws administered by the Public Health Service, and claims arising out of the activities of the Government in flood control or in river and harbor work. It does not exclude injuries caused by officers enforcing the prohibition laws, who in recent years appear to have engaged in somewhat promiscuous target practice at the expense of suspects and innocent by-standers.

President Coolidge failed to sign this bill, after it passed both House and Senate, presumably because of the protest of the Attorney General against that provision of the bill enabling the Comptroller General first to "settle" and determine the validity of the claim and then to appear in the Court of Claims to defend the very settlement he had made. The Comptroller General is thus the judge of the controversy and is later called upon to defend the Government thereon. It would seem that the Attorney General's objection is well founded.

This bill is the culmination of a prolonged effort to persuade the Federal Government to waive its immunity for the torts of its officers. In this respect the United States is decades behind several foreign governments, notably France and Germany, as well as many of the British Dominions and Colonies. A Government bill in England (Crown Proceedings Report 1927, Command 2842), which, it is said, is likely shortly to be approved in Parliament, provides, Section 11:

> The Crown shall be liable for any wrongful act done, or any neglect or default committed, by an officer of the Crown in the same manner and to the same extent as that in and to which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed, by his agent. . . .

The Federal Government has, to a limited extent, opened the door to suit or claim against itself, beginning with contract cases, and since 1922, in tort cases up to $1,000, though relief in these latter cases is administrative only. Although the Constitution provides that "private property" shall not "be taken for public use without just compensation," there was down to 1855 no judicial means of making the requirement effective. Claimants were compelled to adjure Congress to redress their grievances. The defects of this system, both for the claimant and for the members of Congress, led to the establishment of the Court of Claims, with jurisdiction in claims founded upon a "law of Congress or upon any regulations of an Executive Department, or upon any contract, express or implied." To this there were added, by the Tucker Act of 1887, claims founded "upon the Constitution of the United States," a clause which has been construed into comparative mean-

inglessness, and claims "for damages, liquidated or unliquidated, in cases not sounding in tort."

These jurisdictional clauses have been construed most strictly against the claimant. The owner of property taken by Government officers for public use must prove that it was "taken" under an express or implied promise to pay for it. And a promise to pay will not easily be "implied." Impressed by the inhibition against claims "sounding in tort" and by the traditional view that the Government's consent to be sued is to be construed as narrowly as possible, the Supreme Court has given an exceedingly technical construction to the terms "taking" and "implied contract" and a very wide interpretation to the clause "sounding in tort."[1] Thus the physical act of "taking" must so greatly interfere with the private use that the injury and deprivation are permanent and substantial, and not merely temporary or consequential, and, therefore, tortious. There must be an intent to take. Thus, a denial or questioning of the owner's right to the property—except in patent cases under statute—by the Government's assertion of an adverse claim or the denial of an intent to pay, will defeat recovery, for the taking is then tortious. The more flagrant and unjustifiable the Government's acts, the less becomes its liability—hardly a commendable principle of law. Moreover, the circumstances must not negative the owner's open or tacit acquiescence, otherwise the plaintiff will defeat that consensual relation which is supposed to underlie the implied contract—implied in fact, rather than in law. Mere evidence of Governmental enrichment is insufficient to raise the implication of payment; a quasi-contractual obligation will not be recognized, unless, as in tort cases, covered by a special Act of Congress *ad hoc* conferring jurisdiction. Such Acts have occasionally been passed. There are many other legal hurdles placed by judicial construction in the way of claimants. Unless a claimant is fortunate enough to be able to climb them all, he is likely to find his claim dismissed as "sounding in tort."

In recent years the force of circumstances has induced a growing disposition on the part of Congress to authorize suit in tort against the United States or to provide administrative machinery for the determination of legal responsibility under customary rules of law. In 1910 suits for patent infringement were permitted.[2] Since 1900, special statutes have been passed with increasing frequency, either appropriating funds, after committee investigation, to compensate for tort injuries of various kinds or else referring such claims to the Court of Claims or United States District Courts for determination and judgment. A Federal "Employers' Liability Act" has been passed, establishing an Employees' Compensation Commission to provide compensation for disability or death of an employee "resulting from a personal injury sustained while in the performance of duty."[3] In taking over the railroads and certain collateral services during the war, with the

[1] 34 Yale L. J. 28, 30 *et seq.*

[2] Act of June 25, 1910, 36 Stat. L. 851.

[3] Act of September 7, 1916, Ch. 458, 39 Stat. L. 742.

curious exception of the telegraph system,[4] and in establishing a Shipping Board for the operation of merchant ships, the Government placed itself, in respect of legal responsibility, in the position of a private operator.[5] On March 3, 1925 a comprehensive Suits in Admiralty Act was passed,[6] authorizing suits against the United States in the Federal District Courts for damage caused by and salvage service rendered to public vessels of the United States, thus materially extending the scope of the Act of March 9, 1920, relating to publicly-owned merchant vessels. In the operation of its war ships and public vessels, the United States thus waived its sovereign immunity from suit and responsibility, retaining merely those privileges as to limitation of liability possessed by ship owners and operators generally. This step marked an epoch in American public law.

Congress has also passed a number of statutes, mainly since the war, conferring a limited administrative jurisdiction on the heads of the various Executive Departments to settle claims for tort injuries arising in their respective Departments. Even prior to the general Act of December 28, 1922, conferring power on the head of each Executive Department and independent establishment to settle claims for "damages to or loss of privately-owned property" not over $1,000, "caused by the negligence of any officer or employee of the Government acting within the scope of his employment,"[7] numerous Acts had been passed conferring on the heads of certain Departments, mainly War, Navy, and Post Office, a limited power to settle tort claims.[8] Some of the provisions of these Acts, renewed in annual deficiency appropriations, or otherwise, extend the scope of the Act of December 28, 1922 to personal injuries and/or dispense with proof of negligence.

The partial and limited relief thus afforded to claimants in certain tort cases is a recognition of the validity of the principle. It is now admitted that tort claims in excess of $1,000 are equally entitled to consideration. Unable to present them to the Executive Departments or the Courts, the claimants have pressed these claims upon the Government through a bill in Congress—a political, and not a legal, channel. The history of claims against the United States presents a picture of the gradual transfer of claims by Congress from the political to legal channels—first in contract cases, then in small tort and special types of tort claims, like patent and admiralty. Under the Federal Tort Claims bill, general tort claims up to $50,000 are to be submitted to an administrative or quasi-judicial forum.

[4] Western Union Tel. Co. *v.* Poston (1921), 256 U. S. 662, 41 S. Ct. 598.

[5] Act of March 21, 1918 (R. R.); Act of Sept. 7, 1916 (39 Stat. L. 728), Sec. 9; Act of March 9, 1920 (41 Stat. L. 525).

[6] 43 Stat. L. 1112.

[7] Act of Dec. 28, 1922, Ch. 17, 42 Stat. L. 1066.

[8] See for example Act of Oct. 6, 1917, 40 Stat. L. 389; Act of Mar. 29, 1918, 40 Stat. L. 499; Act of Aug. 24, 1912, 37 Stat. L. 586; Act of Oct. 6, 1917, 40 Stat. L. 364; Act of Mar. 4, 1921, 41 Stat. L. 1436; Act of June 16, 1921, 42 Stat. L. 63; Act of June 7, 1924, Ch. 291, 43 Stat. L. 483 and Pub. No. 413, pp. 6–7, 68th Cong.; Veterans' Act of June 7, 1924, 43 Stat. L. 607; Act of May 28, 1924, 43 Stat. L. 199; Act of June 7, 1924, 43 Stat. L. 492.

The Federal Tort Claims bill first passed the House of Representatives, without a dissenting vote, on June 10, 1926 (Sen. 1912, 69th Cong.). In that bill the House removed the Senate limitation of liability of $3,000 and left liability unlimited. The bill as first drafted gave jurisdiction to the Comptroller General—after a report from the executive department concerned, an administrative provision followed in the present bill—to settle and determine claims up to $2,000, subject to Congressional review. Claims between $2,000 and $10,000 were to be submitted to the District Court or the Court of Claims, as the claimant might elect; and claims in excess of $10,000 were to be submitted to the Court of Claims exclusively. It was believed that, when the claim is so large, it is not improper to require a claimant to go to Washington. In claims exceeding $2,000, authority was given to the Comptroller General and the Attorney General jointly to offer compromise settlements, following in this respect the Suits in Admiralty Act of March 3, 1925. The concurrent jurisdiction of the District Courts and the Court of Claims in tort cases followed the existing practice in contract cases (Sec. 24, par. 20 of the Judicial Code).

Apparently the House of Representatives, both in the 69th and the 70th Congress, was unwilling to confer so much power upon the Comptroller General. The House instead, as in the Act of 1922, gave jurisdiction to the executive departments to settle small claims, now increased to $5,000; on claims from $5,000 to $10,000, it gave jurisdiction to the District Courts and Court of Claims concurrently; and on claims above $10,000, to the Court of Claims exclusively. No limitation was set on the amount of property damage recoverable.

The Senate, in the recent bill approved by the conference, changed these provisions materially. As already observed, the General Accounting Office under the Comptroller General is given exclusive jurisdiction of all claims up to $50,000, the limit of general liability, with review on certiorari to the Court of Claims. Claims in excess of $50,000 must be advanced through political channels, as heretofore. The United States District Courts are eliminated from the bill, on the apparent ground (Sen. Rep. 1609, 70th Cong., 2d sess.) that "it is not believed that the procedure of suits against the United States is a proper one to secure judicial determination of tort claims, especially where there is no controversy as to the liability of the United States." On the contrary, there is no sound reason, it is believed, except a historical prejudice against tort claims, why tort claims should not be submitted to the same judicial process as are contract claims. Where there is no controversy as to the liability of the United States, the Comptroller General should have the power to settle with the claimant. But by retaining ultimate jurisdiction over the allowance of claims, Congress evidently has not yet been willing to make tort claims the subject of judicial suit, preferring to regard the Comptroller General and the Court of Claims as advisory bodies for the relief of the House and Senate Committees on

Claims. However grateful we may be for even this slight advance from the historical assertion of immunity in tort, now repudiated by much of the rest of the civilized world, it is to be regretted that full judicial jurisdiction is not conferred in tort as in contract cases. A judicial decision could not properly be reviewed on the merits by Congress, and only on this ground can a denial of jurisdiction to the District Courts be approved. The Senate Report appears to regard the procedure it has set up under the Federal Tort Claims bill as not a "suit against the United States."

The original House bill provided that contributory negligence was not to be a complete bar to recovery, but was merely to reduce or mitigate the damages. The Senate Committee struck this provision out, on the allegation that the "liability of the Government in the Act of December 28, 1922 is too broad," though the Executive Departments under that Act do not, as the Committee assumed, appear to have applied the common law contributory negligence bar. Nor is the rule of mitigation of damages "the doctrine of apportionment of negligence" applied in admiralty, where there are two ships and damages are apportioned. The suggestion that the "apportionment of negligence is wholly impractical of application in tort claims against the United States" is an assertion without evidence in support. Statutes in practically every state in railroad cases have abandoned the common law contributory negligence rule, and it is growing weaker in every state in other matters. It might be well if the new Committee to be appointed were to give further study to this question.

While the Senate Committee seems to find in the Act of 1922, giving jurisdiction to the Executive Departments in small claims up to $1,000, a departure from the sound rule that a man should not be a judge in his own case, it has nevertheless placed on the Comptroller General the duty of defending his own determinations in the Court of Claims. There is no doubt that uniformity of administration is desirable—an end which might have been a little more difficult, though by no means impossible, to achieve, by giving jurisdiction to the Executive Departments in small claims under rules to be fixed by the Comptroller General or the Attorney General. But instead of giving such unified jurisdiction over all claims up to $50,000 to the Comptroller General, why not give jurisdiction over all claims to the Court of Claims, with power to take testimony by means of Commissioners throughout the United States and to give judgment in cases up to $5,000 on a written record without oral argument? A unified procedure and jurisprudence would then develop, the fairness and impartiality of the judge would not be subject to doubt or challenge, and the Attorney General would defend the interests of the United States as a party, rather than the Comptroller General, who, under the bill, is first a judge and then a party. In changing the jurisdiction from the heads of the Executive Departments and the Courts to the Comptroller General, the Senate and the conferees failed to make the necessary changes in title III of the bill, the "Miscellaneous"

provisions, for Section 302 still leaves it to the Executive Departments and to the courts to determine attorneys' fees.

This bill, imposing a limited liability on the United States in tort cases, would establish a municipal responsibility of the United States for the torts of its officers. The legal relations run between the Government and the injured private person, whether he be a national or an alien. This relation must be sharply distinguished from the international responsibility of the United States, which runs not to the injured alien, but to his government or state, and would not arise ordinarily until the alien had pursued his local remedies and established a denial of justice. The fact that the United States has heretofore not been suable generally in tort, has more easily given rise to the international claim. Although suit against the wrongdoing officer is the usual mode of relief in the United States, open to both national and alien, it would probably help to relieve the Department of State from the pressure of diplomatic claims by foreign governments if the United States were municipally suable for the torts of its officers. It is to be hoped that in the 71st Congress an improved Federal Tort Claims bill will finally become a law of the United States. When adopted, it will exert a useful influence in persuading the several states to permit themselves to be sued in tort.

EDWIN M. BORCHARD.

THEODORE SALISBURY WOOLSEY

October 22, 1852—April 24, 1929

Theodore Salisbury Woolsey stands out among the American pioneers who labored for the cause of international justice. A small group had preceded him of whom the most influential were Wheaton, Kent, Field, Dana, and his own eminent father, Theodore Dwight Woolsey. As early as 1878 the son became Professor of International Law at Yale where for some thirty-three years he retained that post, from which he retired in 1911. For the first twenty years of that period, preceding the war with Spain and the convening in 1899 of the First Hague Peace Conference, interest in the law of nations was not widespread or intense in America. Few persons were engaged in constructive work. In the year 1891, when Professor Woolsey published the sixth edition of his father's important book, "An Introduction to the Study of International Law" (reprinted in 1901 and in 1906), Professor Moore was publishing his "Treatise on Extradition and Interstate Rendition;" but his "History of International Arbitrations," and his monumental "Digest of International Law" were still in the making. Dr. Freeman Snow's "Cases and Opinions on International Law" had not appeared. Fifteen years were to elapse before an American Society or an American Journal of International Law, and nineteen before a Carnegie Endowment for International Peace were to come into being.

In the last quarter of the nineteenth century Professor Woolsey was doing spade work, preparing the ground in his own land for the seeds there later sown. When they were sown, his labors did not cease. He took active part in the American Society of International Law of which he early became a member, and of which he was an Honorary Vice-President at the time of his death. He was a frequent contributor to the pages of this JOURNAL on the Board of which he served as an associate editor for many years prior to his retirement. In 1903, Brown University conferred upon him the honorary degree of Doctor of Laws, and in 1921 he became an *Associé d'Institut de Droit International.* It is not sought, however, to marshal Professor Woolsey's achievements in his own profession or in municipal spheres, still less to recount the tokens of esteem which, almost from his boyhood, continued to be showered upon him as long as he lived. They sprang from a variety of sources; and some he would be reluctant to reveal.

But another word must be said. Professor Woolsey was blessed with a rare heritage—an incapacity to become ambitious for the plaudits of the world, or for distinctions by which in this day are oftentimes measured the success of professional life. His thoughts and purposes were of a different order; and their metal was without trace of worldliness. He sought not his own. He rather gave of himself; and his beneficiaries in and out of Yale and New Haven, and in and out of the field of international law, retain something that is imperishable. Theodore Salisbury Woolsey was a man full of grace and truth.

CHARLES CHENEY HYDE.

CAMOUFLAGE IN THE PEACE MOVEMENT

During the World War there came into general use the word "*camouflage,*" derived from a French expression which meant originally "a trick played with smoke," the word having been long in use in police slang with the meaning "to disguise."

It might well have been in still longer use in international diplomacy, in which the idea it is meant to express has played a rôle in peace quite as significant and far more subtle than the part it has played in war.

It sounds almost like an indictment of human nature to apply such a term in the sphere of jurisprudence also. Here also it would mean "to deceive by the profession of just intentions."

And yet it is perhaps not less natural, from the point of view of national interests, than the profession of non-belligerency in disguising the fact of belligerent purposes.

Two events since the World War have engendered a hope that a new era may be expected, namely, the organization of the Permanent Court of Inter-

national Justice by the League of Nations and the signature of the Multilateral Treaty disavowing war as a national policy. Taken together they would seem to the casual observer to put an end to international belligerency and to promise a reign of international law. Without doubt, an unsophisticated mind would readily draw from these correlated facts the inference that universal disarmament on land and sea should immediately follow.

And yet, on closer examination, it does not seem to follow. No responsible statesman has advised his nation that this quite logical inference should be immediately acted upon, and it is quite certain that if such advice were given it would not be followed. In the presence of the facts known to responsible statesmen, although we have reached an era of conferences for the purpose of limiting armaments, not one of these conferences has succeeded in actually accomplishing that purpose or gives assurance of being able to accomplish it at any time in the near future.

One is therefore tempted to inquire why it is that with all the apparatus that has been set up for the perfection of international law, the legal settlement of justiciable differences, and the possible avoidance of future conflicts by observing definitely formulated rules of action internationally agreed upon and solemnly accepted by treaties pledging the national honor to observe them, the nations are still indisposed to limit armament but insist upon the necessity even of increasing it for their necessary defense.

We may well admit that there are practical difficulties to be overcome all along the line of procedure, and especially many theoretical difficulties. Among them there appear to be the following: there has been a decision on the part of the League of Nations that it is not timely to follow the advice offered by its Advisory Commission of Jurists to attempt in successive periodical general conferences to revise, clarify and extend international law, but that any attempt of this kind should be confined to certain limited fields of a non-vital character; there is on its part an unwillingness to confine the Permanent Court of International Justice to strictly judicial action and a determination to make its advisory action the agency of directing policy, thus subjecting questions of policy to the personal opinions by foreign advisers, without prescription by law; there is, further, a manifest unwillingness on the part of Great Powers, members of the League, to sign the so-called "Optional Clause," by which it is agreed to "accept as compulsory, *ipso facto*, and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the statute of the Court."

It is thus made evident that, while it is constantly represented that international law is obligatory on all nations, that a Permanent Court of International Justice already exists, and that it is the duty of all nations, especially of the United States because of its initiative in this direction, to be a participant in the so-called "World Court" and submit its cases of dispute to the jurisdiction of this Court, the facts in the situation are:

1. That there is no accepted general and organized effort to "restate,

formulate and agree upon amendments and additions" to international law, or "endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore," or "to consider subjects not now adequately regulated by international law";

2. That there exists no international court of justice based distinctly on law that is binding upon the judges, but only such law as may issue from their personal opinions.

3. That the Great Powers have not generally accepted the compulsory jurisdiction of the Court; and, therefore, are not legally bound to adjudicate any grievance whatever and cannot be brought before the Court in any matter without their own consent.

4. That a nation may be made to lose its prestige before the world in a matter which cannot be judicially adjusted, as the result of an "advisory opinion" rendered by a body of men not acting as a strictly judicial body, in a matter not judicially before the Court, but one in which other nations have an interest, thus subordinating its own interest to those of others without a process of law.

It is not surprising then that the present international situation should suggest the existence of an attempt to employ in peace a device that has so recently been resorted to in war. When national interests are believed to be really imperilled such expedients may seem proper. They at least have abundant historical justification. But the presence of them in the field of jurisprudence, where the claims of justice are supposed to predominate and to control, must have the effect of convincing thoughtful men who are not jurists that we have not yet passed from the reign of superior power to the reign of law in a sense that justifies the surrender of that independence which it has cost so much to attain and which it would be so easy to sacrifice.

There are current questions under public discussion to which the principles here presented may not improperly apply. If permanent peace is to be attained through justice, the methods and procedure of justice must be above reproach. If it is not thus attainable, it will be sought for in other ways.

DAVID JAYNE HILL.

GROTIUS ON THE TRAINING OF AN AMBASSADOR

The letter of Hugo Grotius to Benjamin Aubéry du Maurier of May 13, 1615,* has never, it is believed, been printed in full in an English translation. Dr. Herbert F. Wright has printed a portion of it, dealing more particularly with law, in a valuable English version of the less well-known works of Grotius,[1] but as the letter gives the point of view of Grotius as to the proper course of study and reading for the diplomatic career, it has been felt that an English rendering of the complete letter will be of interest, particularly

* Printed as an Annex hereto, p. 621.

[1] *Bibliotheca Visseriana*, vii, 131–238, 206.

at this time when a definitive Latin text has been given, involving some emendations, in the first volume of Dr. Molhuysen's new edition of the correspondence of Grotius.

In 1615, when the letter was written, Grotius was thirty-two years of age and occupied a position as a publicist, lawyer, scholar, and literary man not excelled by any in the Netherlands. In politics he was second only to Oldenbarneveldt, to whom he was an active lieutenant, the outcome of which association all the world knows. Benjamin Aubéry du Maurier, at whose request the letter was written, was seventeen years older than Grotius and had been at the Hague for about two years as the ambassador of Louis XIII to the Estates General. Du Maurier was a Protestant and not without experience in affairs, as he had been in the public service since 1589, first under du Plessis-Mornay and afterwards under the Duc de Bouillon. His connection with the Netherlands began in 1607, when he was given special charge of the correspondence of the French embassy at the Hague, the main part of which had to do with the administration of the annual subsidy from France to the Netherlands.

How long Grotius and Du Maurier had been friends is difficult to determine. The earliest letter to be preserved showing their friendship is dated June 5, 1614. They had every reason to be friends, for they had common tastes, a common faith, and common friends in France. The prominence and distinction of Grotius in 1615 and the intimacy of his friendship with Du Maurier relieve the letter of any imputation of condescension or of presumption which the disparity of years might seem to indicate. Grotius, with Oldenbarneveldt, had risked his political fortunes in favoring pro-French policies in opposition to the more nationalistic ones of Prince Maurice, and this was an additional bond between the two. The friendship, in whatever circumstances begun, was an enduring one. Du Maurier undertook his good offices in Grotius's behalf in 1618 and 1619 when Grotius was condemned and sent to prison. From Louvestein Grotius wrote a long letter of condolence upon the death of Du Maurier's wife—a letter which so accorded with the fashion of the time that it was printed and reprinted, a version appearing in English entitled "The Mourner Comforted." Du Maurier did not forget Grotius after the escape from Louvestein, when the fugitive appeared in Paris and was dependent upon the bounty of Louis XIII. Du Maurier's ambassadorship ended in 1624. He died in 1636 after twelve years spent in retirement.[2]

This letter was first printed, seemingly without the knowledge or consent of Grotius, in 1637 as the first in a volume of essays upon educational subjects,[3] and reprinted twice in 1645. Its popularity is further attested by its inclusion in a volume edited by Gabriel Naudé in 1642, of which a French

[2] *Documents inédits sur l'histoire du protestantisme en France et en Hollande, 1566–1636, Aubéry du Maurier, ministre de France á la Haye*, par Henri Ouvré, Paris, 1855.

[3] *H. Grotii et aliorum de omni genere studiosorum . . . dissertationes*, Leyden, 1637.

translation appeared the same year.[4] The letter was included in the collection of letters of Grotius to his French friends, the *Epistolae ad Gallos*, the first edition of which appeared at Leyden in 1648, with at least three reprints.

As to the letter itself, in addition to the interest which attaches to what Grotius considered to be the proper course of reading for a diplomat, it is a striking anticipation of famous passages in the *Prolegomena* to the *De Jure Belli ac Pacis* of 1625. The passage descriptive of the law of nations and public law is almost a word for word repetition of a passage in Cicero. This is reproduced without substantial change in paragraph two of the *Prolegomena*. Some years earlier Grotius had written upon legal theory in Chapter II of the *De Jure Praedae*, and in that chapter Cicero is cited more than once. The passage here found, however, is not there referred to. Even more to the point is this: this Ciceronian passage which Grotius valued so highly gives the clue to the title of his great work. *De Jure Belli ac Pacis, Libri Tres*, is a work on the law of nations and public law, not two associated treatises, one on the law of war and the other on the law of peace. This entire study of the law of war and peace Cicero had proclaimed as a "pre-eminent science" (*scientia praestabilis*).

Grotius mentions three jurists of his day as of worth, Vasquez, Hotman, and Gentili. All three are referred to in the *Prolegomena*. There, however, Vasquez is dismissed as "of hardly any use in relation to our subject," Hotman was of more value, and to Gentili Grotius acknowledged a decided indebtedness.

As to the proper training of ambassadors, there were treatises upon the subject in 1615 with which Grotius may not then have been acquainted. There was Gentili's *De Legationibus Libri Tres*, first printed in 1594. This Du Maurier might have read with profit had Grotius recommended it to him. As to how far Du Maurier was able to follow the generous recipe furnished him by Grotius we are not advised. Judging from the difficulties of Du Maurier's position at the Hague, difficulties which increased as the years passed, a guess may be hazarded that the days, filled with recriminations over pro-French, pro-Spanish, and pro-British policies, with controversies over Gomarist and Arminian theological positions, with the endless discussions occasioned by the Synod of Dort, were not long enough to include what, even to the ceaselessly active Grotius, was leisurely and abundant reading.

JESSE S. REEVES.

ANNEX *

TO BENJAMIN DU MAURIER, ILLUSTRIOUS AMBASSADOR OF THE KING OF FRANCE

My dear Sir:

I have been looking for an opportunity to run over and offer you what I have got together recently, but I see that the days are passing, and matters of business, which have accumulated

[4] G. Naudaeus, *Bibliographia politica*, Leyden, 1642; G. Naudé, *La bibliographie politique*, Paris, 1642.

* Translated with notes by Professor James E. Dunlap, University of Michigan.

during my long absence from the city, are so pressing that my hope of seeing you in the near future is growing fainter and fainter, and I am beginning to weary of indefinite postponement. If I could be with you and, possibly, have the help of Heinsius,[1] that prince of geniuses, I could explain the details of my plan more satisfactorily, and by comparing your ideas and mine I could work out some consistent plan of procedure. Meanwhile I do not feel that I ought to permit delay on my part to rob you of the profitable use of your time, inasmuch as this whole matter was brought up for consideration precisely for the purpose of saving time. However, since I must choose one course or the other, I should prefer making the smaller payment to standing longer in your debt, and so I am putting on paper matters which I should prefer to handle in a personal conversation, knowing that if what I write falls short in any particular, it can be rectified at some other time when I can discuss it with you.

Really, I should have entered a vigorous plea to be excused from giving any advice to a man of your importance and ability, especially in the way of suggesting a rational course of study. The fact that you proposed it, however, will justify my attempt, for it would be a greater offense in me not to comply with your request than, in complying, to make an occasional error.

Now, in considering this matter, I shall keep three things in mind: your years, Sir, your official position, and lastly the demands upon your time. If men still have a long span of life before them, if they are their own masters, and ask of letters only the solace and adornment of their private lives, then there is no reason why they should not be conducted at a leisurely pace and by delightful by-paths through every field of knowledge. In your case, however, your already advanced years and your occupation in matters of great importance, frequently under orders, confine your mental activities to a more restricted compass, and compel you to follow short cuts rather than pleasant paths. You will do wisely therefore if you remind yourself frequently of the fact that you are an ambassador, and direct the whole plan of your studies with a view to the practical use of letters rather than to their enjoyment.

Accordingly, since all philosophy is divided into speculative and practical philosophy, you ought to give special attention to the latter, regarding the former as being merely ancillary to it. Logic is the common instrument of both of these branches, and so reason demands that you begin with this subject. I should not have you go for it to the works of Aristotle [2] himself, for he gives it a fuller treatment than is necessary, and you would encounter much on every page that would be of little or no value. It will be enough if you read some condensed treatment, such as that of Du Moulin [3] or Crell [4]—with the understanding, however, that your assistant, who has so much more time than you have, is to read the most eminent authorities on the subject, and not forget to bring to your attention, at the proper place, anything he may find which is of value. An hour or two spent in this way will give you the benefit of a much longer period of study. I suggest this method in dealing not only with logic, but with other arts and sciences as well; yes, and with single books. Assign him the task of running through all the best commentators to collect bit by bit the information which he will then measure out to you in large quantities.

Logic should be followed by physics. This is another subject in which you need not follow Aristotle's lengthy treatment, for in this case also some brief and lucid writer can give

[1] Daniel Heinsius (1580–1655), the famous classical scholar and librarian of the University of Leyden, who was a life-long friend of Grotius.

[2] Grotius' own copy of Aristotle, containing some manuscript notes, is now in the public library of Leyden. It is the *Opera omnia, ed. Pacii*, Geneva, 1597.

[3] Pierre du Moulin became professor of philosophy at Leyden in 1592, at the age of 24 years. Here Grotius listened to his lectures. In 1596 appeared his *Elementa logices*, which was reprinted 13 times in a brief period.

[4] *Fort. Crellii Isagoge logica in 2 partes distributa.* "I know only the 4th edition of Neustadt 1592." Molhuysen.

you all that is necessary, and no one occurs to me at the present time whom I could recommend more heartily than my friend Jack.[5] Moreover, just as the forms of the syllogisms and the rules of dialectic are of special use in logic, so in the field of physics there is nothing more important and more pertinent to moral philosophy than the part which traces the nature and functions of the soul.[6] For this reason I do not believe that you should treat these portions in any perfunctory manner, but rather with more precision and care than the rest. After physics I should advise you to dip into metaphysics too, that is, the fundamental principles of philosophy. You could get a taste of the subject from Timpler's [7] book, which is neither very long nor very difficult. I fear however that I am making too heavy demands upon your time.

Let us turn then to practical philosophy, of which the first part is moral philosophy, the second, political philosophy. If, as I imagine, you wish not merely to taste of these subjects, but to drink deeply of each of them, you must read Aristotle himself, for he is the supreme master of the art of instruction. The Nicomachean Ethics is the best of the works on ethics which pass under his name; only one of his works on politics is in existence. Have your reader make you a brief report of what the most learned commentators on these books have written. In the Ethics, however, you should observe particularly the differences between the sects, noting carefully the teachings of Pythagoras, of the stern Portico, of the Old and the New Academy, and of the Garden of Epicurus; for if we are ignorant of these distinctions a thick mist rises before us when we try to read the books of ancient writers, and their value is lost.

Some short but very useful books, which will give you no ordinary amount of pleasure, may be scattered in here and there, so that you will not be wearied by close and continued reading of Aristotle and Aristotle alone, for he treats every subject in accordance with the laws of his art.[8] Such, in the first place, are the books of those writers on manners who employ an aphoristic style, as the author of Ecclesiasticus and the Book of Wisdom in the Apocrypha, also Theognis and Phocylides.[9] Then there is the writer of the Golden Verses, said to be the work of Pythagoras, and the Enchiridion of Epictetus. To these two books, which are small, to be sure, but esteemed by men of ancient times, you can add much that is fine if you will read Hierocles in connection with the Golden Verses and, as a fuller interpreter of Epictetus, Sulpicius, and Arrian.

Moreover, you really must not fail to read the divine book of Theophrastus,[10] which is the only example left to us of the kind of exposition which the ancients called "character portrayal" unless you wish to place in the same category the poetical works which are largely

[5] Gilbert Jack, an Aberdeen Scot who was doctor of medicine and professor of physics at Leyden. His *Institutiones physicae, metaphysicae et medicinae* had appeared in 1614. In 1616 he published his *Primae philosophiae institutiones* which he wrote at the urging of Grotius.

[6] Throughout this passage Grotius uses the word physics in its classical sense. In mentioning Aristotle he seems to refer to all the physical treatises, one of which is the *De anima*.

[7] Clemens Timpler, whose *Technologia et systema methodicum metaphysicae*, written in 1604, was published with commentaries by Rud. Goclenius at Hanover in 1608 and 1616.

[8] *i.e.* at great length.

[9] The poems attributed to Theognis form the nearest approach in Greek to the Book of Proverbs. Phocylides' comments on life are more epigrammatic. The works of these two poets were frequently published together with the verses attributed to Pythagoras in the half-century preceding the date of this letter. Many selections appear in the *Florilegium* of Stobaeus, which may have been engaging the attention of Grotius even at this date.

[10] The *Characteres*. Isaac Casaubon's edition of this work, with its rich commentary, had been published in Leyden in 1592, and reprinted in 1598 and 1612. It is possible, however, that Grotius would have recommended the edition by his friend, Daniel Heinsius, which appeared at Leyden in 1613, only two years before the date of this letter.

concerned with manners, such as the choicer tragedies of Euripides,[11] the comedies of Terence and Horace's Satires.[12] In these writings young men notice one quality and older men admire another: the young men are delighted by the purity and elegance of the language, while their elders observe in them, as in a mirror, the lives and manners of men. If this were not seasoning enough for ethics, I should add the Offices of Cicero, a book less highly regarded than it should be, for the very reason that it is so familiar to everyone. Also, I should add certain letters of Seneca, his tragedies, and the shortest and best of Plutarch's books.

Likewise, I suggest that you read in connection with the Politics of Aristotle some brief but worth-while works, such as the very fine extracts from Polybius [13] on the subject of politics, the address of Maecenas and Agrippa to Augustus from the works of Dio,[14] and Sallust's letters to Caesar. Then it would not be out of place to add, from Plutarch, the lives of such men as were believed to be pre-eminent for their knowledge of statecraft, as, for example, Pericles, Cato, the Gracchi, Demosthenes and Cicero. Cicero's letters to Atticus and to certain other friends will be of great value, provided you have the assistance of someone who is familiar with the period in which they were written, so that he can explain to you the facts of Roman history. There is no better book than this to show the way in which general principles should be applied to particular situations.

I think you should most certainly read the Rhetoric of Aristotle, but after the Ethics and Politics, which is a different order from that commonly thought proper. That master of all the arts and sciences saw that it was necessary to draw upon moral and political philosophy for the art of persuation. Furthermore, in order that you may observe the application of principles in this field also, I should advise a careful reading of certain orations of Demosthenes [15] and Cicero; not their legal speeches, but those which deal more particularly with matters of statecraft, such as the Philippics of either writer, the Olynthiacs of Demosthenes, Cicero's For the Manilian Law, and Against the Agrarian Law, and some others.

After you have covered this ground, there is nothing which I should recommend to you so highly as the study of law; not private law, out of which shysters and pettifoggers make their living, but the law of nations and public law, which Cicero, who calls it a pre-eminent science, says consists of the treaties, truces and covenants of peoples, kings and nations—in short, of the whole law of war and peace.[16]

Plato's and Cicero's books On Laws will show you how the basis of this law is to be sought in moral philosophy, but in the case of Plato a reading of some of his main points will be sufficient. Moreover, in case you do not read through Thomas Aquinas, of the Scholastics, you will not regret taking at least a look into the Second Part of the Second Part of the work which he has entitled the *Summa Theologiae*, especially where he treats of justice and the laws. The first and last books of the Pandects and the first and last three books of the Code

[11] A once celebrated but now rare edition of Euripides' works by P. Stephanus was produced at Geneva in 1602. Dibdin refers to a splendidly bound copy of it which once belonged to Grotius' friend De Thou.

[12] The Elzevir editions of Horace, first appearing in 1612, had been superintended by Daniel Heinsius.

[13] These extracts were preserved among the excerpts from various historians made in the tenth century at the order of the Emperor Constantine Porphyrogenitus. They were first published in Casaubon's edition of the works of Polybius, which appeared at Paris in 1609.

[14] In the first thirteen chapters of Book 52 of Dio's history. Grotius is apparently citing from memory, for while Dio states that Maecenas and Agrippa were frequently consulted together by Augustus, he definitely attributes this address to Agrippa.

[15] The most recent edition of Demosthenes had been published in Paris in 1570 "apud Jac. Du Puys."

[16] Cicero, Pro Balbo, VI, 15:—*praestabilem (eius) esse scientiam in foederibus, pactionibus, condicionibus populorum, regum, exterarum nationum, in universo denique belli iure atque pacis* (a vexed passage which Grotius has not quoted with verbal accuracy).

of Justinian will make clear the more specific application of these principles. Few jurisconsults of our day have touched upon the disputed points of the law of nations and public law, and for that reason those who have done so, as Vasquez,[17] Hotman [18] and Gentili,[19] are the more conspicuous.

Now, if one be well versed in these branches of learning, the reading of history will be of remarkable value to him, for if he knows the general principles, together with the nature of the point at issue in each case, he can very easily assign cases to their proper categories, either from memory or, if necessary, by the aid of brief notes. The reading of history, however, should by all means be preceded by a general description of the world and an outline of the whole course of events, and by a reading of such authors as Justin, Florus, and the epitomizer of Livy, who summarize important occurrences. For the rest, in reading history I should prefer that you follow your own inclination rather than be on the trail of bothersome laws.

While any work on history possesses great value, and those which we read with enjoyment stay with us better, nevertheless, as a general practice I think it more profitable not to begin with the historians of antiquity, but with those who are closer to our own day and matters of our own knowledge, and then gradually to work into more remote times. In Roman history it should not be forgotten that, in general, more profit is to be drawn from Greek writers than from Roman, for the reason that outsiders are more careful in their observations and descriptions of customs and public ceremonies.

But we shall not lack an opportunity to talk these matters over together, and it is better that I break off the thread of this discourse rather than to interfere with your studies by taking time to outline them too painstakingly, for no time must be taken from them except that which is given to the business of your most Christian king and of our government.

Illustrious Sir, for the good of both our countries, may God preserve you unharmed for a long time to come, and may He give you the two aids of a good mind, sound health and unvarying good fortune, so that your noble endeavor may meet with splendid success.

Your Honor's most devoted,

HUGO GROTIUS.

ROTTERDAM, *May 13, 1615.*

[17] Fernando Vásquez Menchaca (1509?–1566), a Spanish jurist, wrote *Illustrium controversiarum aliarumque usu frequentium libri VI.*

[18] Francois Hotman (1524–1690), a French jurist and a prolific writer on legal subjects.

[19] Alberico Gentili (1552–1608) wrote *De legationibus libri tres,* 1584, and *De jure belli libri tres,* 1598.

CURRENT NOTE

SUPREME COURT HOLDS MADAM SCHWIMMER, PACIFIST, INELIGIBLE TO NATURALIZATION

By a 6 to 3 decision, the Supreme Court of the United States, on May 27, 1929, held that Madam Rosika Schwimmer, avowed "uncompromising pacifist," is not eligible to become a citizen of the United States.[1]

Judge Carpenter, of the District Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, after consideration of the testimony in open court of Madam Schwimmer and her witnesses, had denied her petition for naturalization on November 14, 1927. He held that "the said petitioner is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and further that she is unable to take the oath of allegiance prescribed by the Naturalization Law without a mental reservation." The applicant appealed to the Circuit Court of Appeals for the Seventh Circuit from the decree of denial. The latter court reversed the District Court on June 29, 1928, and remanded the case with direction that applicant's petition for naturalization be granted.[2]

Petition for *certiorari* was filed by the United States in the Supreme Court on September 29, 1928, and granted November 19, 1928.[3] After argument on the merits it was disclosed by the decision handed down by Mr. Justice Butler that the majority of the Supreme Court did not agree with the Circuit Court of Appeals. The action of the Circuit Court of Appeals was reversed and the decree of the District Court denying the petition for naturalization affirmed. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, wrote a dissenting opinion, as did also Mr. Justice Sanford.

The provisions of law governing this case may be found in the Naturalization Act of June 29, 1906, as amended:

> It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant,

[1] The United States of America, Petitioner, *v.* Rosika Schwimmer (No. 484.—October Term, 1928, Supreme Court of the United States), May 27, 1929, on writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. See text of this opinion in this JOURNAL, p. 652.; also in *The United States Daily*, Washington, D. C., May 28, 1929, Vol. IV, No. 74, pp. 4 and 12, yearly index 748 and 756.

[2] Schwimmer *v.* United States (C. C. A. 7th Cir., 1928), 27 F. (2d) 742.

[3] United States *v.* Schwimmer (No. 484, November 19, 1928), 278 U. S. 595.

> the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.[4]
>
> He [the applicant for naturalization] shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.[5]

The required oath of allegiance which is referred to is as follows:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to . . . of which (whom) I have heretofore been a citizen (subject); that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.

The question at issue in the Schwimmer case as stated by the Circuit Court of Appeals was, "Did she make it appear that she had behaved, that is, conducted herself, as a person of good moral character, attached and disposed as the statute requires, during the time fixed by it?" This court states that the views of Madam Schwimmer relied upon to support the denial of her petition sufficiently appear in her answers to a questionnaire submitted to her by the District Director of Naturalization, and in her expressed willingness to take the oath of allegiance. She was asked, "If necessary, are you willing to take up arms in defense of this country?" Her reply in the questionnaire was, "I would not take up arms personally." Upon the hearing before the District Court she said:

> I am able to take the oath of allegiance without any reservations. I am willing to do everything that an American citizen has to do except fighting. If American women would be compelled to do that, I would not do that. I am an uncompromising pacifist. Asked how far does that go—if I disapprove of the government fighting, I answer, it means I disapprove of the government asking me to fight personally with my fists or carrying a gun. I do not care how many other women fight, because I consider it a question of conscience. I am not willing to bear arms. In every other single way I am ready to follow the law and do

[4] Subdiv. 4, Sec. 4, Act of June 29, 1906, 34 Stat. 598; U. S. C. t. 8, Sec. 382. This subdivision has been amended by Sec. 6(b), Act of March 2, 1929, Public—No. 962, effective July 1, 1929. See text of the latter in SUPPLEMENT to this JOURNAL, Vol. 23, No. 2, April, 1929, pp. 115–116.

[5] Subdiv. 3, Sec. 4, Act of June 29, 1906, 34 Stat. 597–598; U. S. C. t. 8, Sec. 381.

> everything that the law compels American citizens to do. That is why I can take the oath of allegiance, because as far as I can find out, there is nothing that I could be compelled to do that I cannot do. If it is a question of fighting, as much as I desire American citizenship, I would not seek the citizenship.

In the opinion of the Circuit Court of Appeals, applicant's views, whether expressed at the hearing on her petition for naturalization or prior to that time might be important as disclosing whether her conduct was that required of applicants, "but mere views are not, by the statute, made a ground for denying a petition."[6] The court further said that the views expressed by the applicant at most reveal an unwillingness personally to bear arms, and it being agreed that she had shown herself in every other way qualified for citizenship her petition should have been granted unless her expressed unwillingness to bear arms makes her conduct that of a person not attached to the principles of the Constitution of the United States, or not well disposed to the good order and happiness of the same.

Attention is then called by the court to the fact that the case is not that of a male applicant able to bear arms and within the usual conscription age, but a woman fifty years of age. Women are considered incapable of bearing arms, male persons of the applicant's age have not been compelled to do so, and if she should be admitted, she couldn't by any present law be compelled

[6] But see United States *v.* Raverat (D. C. Mont., 1915), 222 Fed. 1018, in which the court said: "Under the present law [Act of June 29, 1906, 34 Stat. 596] even beliefs, thoughts, internal acts, may disqualify."

And Sec. 7, Act of 1906, *supra;* 34 Stat. 598–599; U. S. C. t. 8, Sec. 364, provides: "That no person who *disbelieves* in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such *disbelief* in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States." (Italics supplied.)

Also Par. 2, Subdiv. 2, Sec. 4, Act of 1906, *supra;* 34 Stat. 597; U. S. C. t. 8, Sec. 379, provides in part that "The petition [for naturalization] shall set forth that he is not a *disbeliever* in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching *disbelief* in or opposed to organized government, a polygamist or *believer* in the practice of polygamy, . . ." (Italics supplied.)

And Sec. 27, Act of 1906, *supra;* 34 Stat. 603–606; U. S. C. t. 8, Sec. 409, requires the sworn declaration of intention to become a citizen to include the allegation, "I am not an anarchist; I am not a polygamist nor a *believer* in the practice of polygamy; . . . " and the sworn petition for naturalization to include the allegation, "I am not a *disbeliever* in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching *disbelief* in organized government. I am not a polygamist nor a *believer* in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to . . . , of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States." (Italics supplied.)

to bear arms and probably never would be required to do so. In other words, says the court, "there is put to her an hypothetical question—what would she do under circumstances that never have occurred and probably never will occur—and upon her answer to this supposed case her petition is denied. A petitioner's rights are not to be determined by putting conundrums to her." Finally the Circuit Court of Appeals declares that the views of the applicant relied upon to support the denial of her application have no substantial relation to the inquiry authorized by the statute, were immaterial to that inquiry and do not furnish sufficient basis for the decree of denial.

Madam Schwimmer is an internationally known linguist, lecturer and writer; she is well educated, and accustomed to discuss governments and civic affairs. She was born in Hungary in 1877, and is a citizen of that country.[7] It is shown that she came to the United States in August, 1921, to visit and lecture, has resided in Illinois since that date, declared her intention to become a citizen in November of the same year, and filed her petition for naturalization in September, 1926.

In the stipulation of facts upon which the case went to the Circuit Court of Appeals appears the following:

> Formal proof as to residence, moral character and fitness for citizenship was given by the witnesses who verified the petition.
>
> It is agreed that the testimony at the hearing of the petition shows that the petitioner is qualified for citizenship except insofar as the views of the applicant set forth in the foregoing agreed statement of facts may show that the applicant is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and except insofar as the same may show that she cannot take the oath of allegiance without a mental reservation.

The decision in the Supreme Court therefore turned upon the applicant's views, opinions and beliefs. She gave utterance at various times during the pendency of her petition to the following:

> I cannot see that a woman's refusal to take up arms is a contradiction to the oath of allegiance. . . . If . . . the United States can compel its women citizens to take up arms in the defense of the country—something that no other civilized government has ever attempted—I would not be able to comply with this requirement of American citizenship. In this case I would recognize the right of the government to deal with me as it is dealing with its male citizens who for conscientious reasons refuse to take up arms. . . . I am an uncompromising pacifist. . . . I have no sense of nationalism, only a cosmic consciousness of belonging to the human family. . . . That "I have no nationalistic feeling" is evident from the fact that I wish to give up the nationality of my birth and to

[7] There seems to be a popular misunderstanding that in filing a declaration of intention or petition for naturalization in the United States the alien at that time renounces allegiance to the country of which he is a citizen or subject. This is not true. The applicant merely swears that *it is his intention* to renounce his allegiance in the future. The oath of renunciation is not taken unless the applicant is admitted to citizenship.

> adopt a country which is based on principles and institutions more in harmony with my ideals. My "cosmic consciousness of belonging to the human family" is shared by all those who believe that all human beings are the children of God. . . . With reference to spreading propaganda among the women throughout the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that.

She expressed steadfast opposition to any undemocratic form of government and claimed to have defended American ideals abroad.

In commenting upon her views and purposes, the Supreme Court states she had other ways and means in mind to fulfill the duty to support and defend the Constitution and laws than the use of arms. But the court declares "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution." The common defense was one of the purposes for which the people ordained and established the Constitution.

The objects of the power given by it to Congress in relation to the armed forces are summarized, but the court did not feel it necessary to refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by force of arms. The court had already held in the Selective Draft Law Cases,[8]

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.

The Supreme Court regards the influence of conscientious objectors against the use of military force in defense of the principles of our Government as apt to be more detrimental than their mere refusal to bear arms. Madam Schwimmer's testimony showed to the court that her objection to military service rested on reasons other than mere inability because of her sex and age. It clearly suggested that she is disposed to exert her power to influence others to such opposition. Two kinds of pacifists are described, a pacifist in the general sense of the word being "one who seeks to maintain peace and to abolish war." Such purposes are in harmony with the Constitution and policy of our Government. But the other refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal.

The court says:

> And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization.

[8] Selective Draft Law Cases (1918), 245 U. S. 366, 378.

During the recent war many citizens were found among pacifists and conscientious objectors who were unwilling to bear arms and who refused to obey the laws of the United States and the lawful commands of its officers, and encouraged such disobedience in others. Several thousand who were called to camp made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. Obviously, the acts of such offenders evidence a want of attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence under the naturalization act.[9]

Whatever, said the Supreme Court, tends to lessen the willingness of citizens to discharge the duty to bear arms in the country's defense detracts from the strength and safety of the Government. Their opinions and beliefs, as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if a large number of citizens oppose such defense the "good order and happiness" of the United States cannot long endure. It is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. Madam Schwimmer's own statements show that her declared opinions as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.

Mr. Justice Holmes, in his dissent, could hardly see how the adequacy of her oath could be affected by her extreme views in favor of pacifism, inasmuch as she is a woman over fifty years of age and would not be allowed to bear arms if she wanted. Applicant's examination showed she held none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other. And, said he, it cannot show lack of attachment to the principles of the Constitution that she thinks it can be improved. Her particular improvement looking to the abolition of war seemed to the justice not materially different in its bearing on the case than a wish to establish cabinet government as in England, or a single house or one term of seven years for the President. And only a judge mad with partisanship would exclude an applicant who thought the Eighteenth Amendment should be repealed. He believed unfounded the fear that if a war came Madam Schwimmer would exert activities such as were dealt with in Schenck *v.* United States.[10] Her motives, the justice thought, were wholly

[9] It should be noted that the courts quite generally have denied naturalization to those aliens who were registered during the World War under the draft law (Secs. 2 and 4, Act of May 18, 1917; 40 Stat. 76, 77–78; and Ch. XII, Secs. 1, 2, 3 and 4, Act of July 9, 1918, 40 Stat. 845, 884–885), but who claimed exemption from military service on the ground of their alienage. In all, thirty thousand applicants have been refused citizenship for this attitude on their part.

[10] Schenck *v.* United States (1919), 249 U. S. 47, 52, in which two defendants had been convicted under the Espionage Act of June 15, 1917, of obstructing the recruiting and

different from those of Schenck. While the justice did not share her optimism for peace, he thought her anticipations an argument for her admission:

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

He suggested that the Quakers had done their share to make the country what it is, that many citizens agreed with the applicant's belief, and that he had not supposed hitherto that we regretted our inability to expel them because they believe more than some others in the teachings of the Sermon on the Mount.

Mr. Justice Sanford, in his dissent, agreed in substance with the views of the Circuit Court of Appeals below and thought that its decree should be affirmed.

Reverting to the majority opinion, it is pertinent to record the court's most recent expressions concerning the nature of proceedings for naturalization and the duty of applicants and the courts respecting them:[11]

> Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native born citizens. All alike owe allegiance to the Government, and the Government owes to them the duty of protection. These are reciprocal obligations and each is a consideration for the other. Luria *v.* United States, 231 U. S. 9, 22. But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government. And, in order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications. Tutun *v.* United States, 270 U. S. 568, 578. And see United States *v.* Ginsberg, 243 U. S. 472, 475.

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enlistment service of the United States during the war with Germany. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

[11] The United States of America, Petitioner, *v.* Rosika Schwimmer (No. 484.), *supra.*

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1929–MAY 15, 1929

(With references to earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. I. I.*, Bulletin de l'Institut Intermédiaire International. *B. I. N.*, Bulletin of international news; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. Q. B.*, League of Nations Quarterly Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *M. B. T. I.*, U. S. Monthly Bulletin of Treaty Information; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. press notice; *R. D. I.*, Revue de Droit International; *R. G. D. I. P.*, Revue Générale de Droit International Public; *R. D. I. P.*, Revue de Droit International Privé; *R. J. I. L. A.*, Revue Juridique International de la Locomotion Aérienne; *R. R.*, American Review of Reviews; *U. S. C. R.*, U. S. Commerce reports.

August, 1928

2 ETHIOPIA—ITALY. Signed motor traffic convention. Text: *E. E. P. S.*, Jan. 15–31, 1929, p. 288.

9–19 PAN PACIFIC WOMEN'S CONFERENCE. First conference held in Honolulu. Resolutions: *L. N. Q. B.*, Jan., 1929, p. 10.

October, 1928

23 MEXICO—PANAMA. Signed extradition treaty. *P. A. U.*, April, 1929, p. 386.

November, 1928

1 PEACE DAY. Conference for studying draft declaration for a universal peace day was held in Paris. Declaration approved: *L. N. Q. B.*, Jan., 1929, p. 38.

30 *to December* 15. INTERNATIONAL CONGRESS OF WOMEN. Third International Congress of Women held in Buenos Aires. *P. A. U.*, March, 1929, p. 312.

December, 1928

11 AUSTRIA—ESTONIA. Signed most-favored-nation commercial treaty. *U. S. C. R.*, Mar. 25, 1929, p. 767.

13 CZECHOSLOVAKIA—SPAIN. Signed agreement to modify commercial treaty of July 29, 1925. *U. S. C. R.*, April 15, 1929, p. 187.

18 PANAMA CONSTITUTION. Article 67 and paragraph 17 of Article 73 were amended. Text: *P. A. U.*, April, 1929, p. 389.

25 BOLIVIA—BRAZIL. Signed treaty on boundaries and railway communications, supplementary to those of Mar. 27, 1867 and Nov. 17, 1903, and replacing the four protocols of Sept. 3, 1925. *P. A. U.*, March, 1929, p. 271.

27 COSTA RICA—GREAT BRITAIN. Signed most-favored-nation commercial travelers' agreement. *U. S. C. R.*, April 22, 1929, p. 242.

29 PAN AMERICAN MEDICAL CONGRESS. First Pan American medical congress opened in Havana. *P. A. U.*, March, 1929, p. 306.

30 ITALY—SPAIN. Signed temporary most-favored-nation commercial agreement to replace treaty of Nov. 15, 1923. *U. S. C. R.*, April 29, 1929, p. 302.

January, 1929

3 PORTUGAL—SWEDEN. Signed convention on navigability, and equipment of merchant vessels. *World trade*, April, 1929, p. 347.

5 ECUADOR—GREAT BRITAIN. Signed commercial travelers agreement. Text: *G. B. Treaty Series*, no. 8 (1929), *Cmd.* 3310.

5 GREAT BRITAIN—PERSIA. Exchanged correspondence regarding Persian claim to sovereignty over Bahrein Islands. *L. N. M. S.*, Mar. 15, 1929, p. 59.

6 *to April* 17 PERMANENT COURT OF INTERNATIONAL JUSTICE. On Jan. 6, Elihu Root accepted invitation of League of Nations to act on Committee of Jurists to revise statutes of the Court. *N. Y. Times*, Jan. 8, 1929, p. 1. On Feb. 19 Secretary Kellogg sent note to all powers signatory to the Court protocol defining attitude of United States toward the Court, particularly regarding the fifth American reservation, and suggesting informal exchange of views. Text: *U. S. Daily*, Feb. 20, 1929, p. 1. *N. Y. Times*, Feb. 20, 1929, p. 1. On March 6, Root formula on entry of United States into the Court was made public. Text: *N. Y. Times*, March 7, 1929, p. 1. On March 11, Committee of Jurists met at Geneva, to discuss Root formula and other matters. On March 13, the Committee agreed to recommend increase in number of judges in the Court from 11 to 15. *Times* (London), Mar. 14, 1929, p. 15. On March 18, it approved a revised text of draft statutes submitted by Mr. Root and Sir Cecil Hurst. Text: *Times* (London), Mar. 19, 1929, p. 15. *N. Y. Times*, Mar. 19, 1929, p. 1, 8. Hurst report to be submitted to League Council in June with new protocol. *N. Y. Times*, Mar. 20, 1929, p. 1, 4. Statement of Elihu Root on his return to America on April 17. *N. Y. Times*, April 18, 1929, p. 29. Draft protocol adopted by the Committee of Jurists on March 28. Text: *L. N. M. S.*, April 15, 1929, p. 99. Reports adopted by Committee (C. 142. M. 52. 1929. V).

8–31 DENMARK—SPAIN. Exchanged notes in agreement to grant reciprocal most-favored-nation treatment for certain products of Spanish territories in Gulf of Guinea imported into Denmark and Greenland and exported from those countries into Gulf of Guinea. *U. S. C. R.*, Mar. 25, 1929, p. 767.

9 DOMINICAN REPUBLIC CONSTITUTION. Article 3 was amended by act of Constitutional Assembly to permit conclusion of boundary treaty with Haiti. *P. A. U.*, April, 1929, p. 388.

10 COLOMBIA—SWEDEN. Exchanged ratifications of commercial treaty signed Mar. 9, 1928. *World trade*, April, 1929, p. 347.

20 FRANCE—GREAT BRITAIN. Agreement concerning limits of zone reserved for fisheries in Granville Bay signed at London Dec. 28, 1929, came into force in France. Text, *J. O.*, Feb. 5, 1929, p. 1538.

21 BULGARIA—UNITED STATES. Signed arbitration and conciliation treaties. *U. S. Daily*, Jan. 23, 1929, p. 2. *Press notice*, Jan. 21, 1929.

21 DOMINICAN REPUBLIC—HAITI. Signed boundary treaty and agreement for arbitration by mixed commission of five members. *P. A. U.*, April, 1929, p. 385.

28 *to February* 17 LEAGUE OF NATIONS PREPARATORY COMMITTEE FOR CONFERENCE ON CODIFICATION OF INTERNATIONAL LAW. Held second session to consider replies to questionnaire sent out in February, 1928, dealing with nationality, territorial waters, and responsibility of states. *L. N. M. S.*, Mar. 15, 1929, p. 51. Answer of United States to questionnaire on three points received at Secretariat of the League on April 11 in two long memoranda on nationality and territorial waters. (Third memoranda on responsibility not yet submitted.) *N. Y. Times*, April 12, 1929, p. 7.

30 EGYPT—YUGOSLAVIA. Provisional commercial treaty arranged by exchange of notes on May 12, 1927, came into force. *U. S. C. R.*, Mar. 25, 1929, p. 767.

February, 1929

4 AUSTRIA—UNITED STATES. President Coolidge signed House Joint Resolution 340, to authorize Secretary of the Treasury to coöperate with other relief creditor governments to assist Austria in floating a loan to obtain funds for reconstruction program. *Pub. res. 81, 70th Cong., 2d sess.*

7 AUSTRIA—LITHUANIA. Exchanged ratifications of most-favored-nation commercial treaty signed Oct. 5, 1928. *U. S. C. R.*, May 13, 1929, p. 433.

8–9 INTERNATIONAL MUSEUMS OFFICE. Advisory committee of experts met in Paris. *L. N. M. S.*, Mar. 15, 1929, p. 54.

11–20 PAN AMERICAN TRADE MARK CONFERENCE. Held in Washington. Protocol, convention and final act signed on Feb. 20. Text of Convention: *U. S. Daily*, Feb. 21, 1929, p. 3. Text of protocol on inter-American registration of trade marks and regulations of Inter-American trade mark bureau. *P. A. U.*, April, 1929, p. 325.

14 EGYPT—SPAIN. Egyptian government denounced protocol signed in Alexandria Aug. 25, 1892, conceding most-favored-nation treatment to Spanish subjects, ships, navigation, and commerce. Existing arrangement will terminate on Feb. 16, 1930. *U. S. C. R.*, May 13, 1929, p. 433.

15 GERMANY—GREAT BRITAIN. Exchanged ratifications of convention of Mar. 20, 1928, regarding legal proceedings in civil and commercial matters. Text: *G. B. Treaty Series*, no. 5 (1929), *Cmd.* 3286.

17 GERMANY—PERSIA. Signed treaty of friendship and arbitration. *Times* (London), Feb. 19, 1929, p. 13. *B. I. N.*, Mar. 2, 1929.

18 AUSTRIA—ITALY. Exchanged ratifications of additional protocol of Dec. 30, 1927, to commerce and navigation treaty signed April 28, 1923. *World trade*, April, 1929, p. 344.

18 GREECE—UNITED STATES. Exchanged ratifications of liquor smuggling treaty signed April 25, 1928. Text: *U. S. Treaty Series*, no. 772.

18 PANAMA CANAL ZONE. Opened to aircraft of all countries, on Feb. 18, under regulations prescribed by the Governor, by executive order of President Coolidge. *N. Y. Times*, Feb. 21, 1929, p. 26. *Exec. Order No. 5047.* Regulations promulgated by Secretary Kellogg on Feb. 28. Text: *Press notice*, Feb. 28, 1929.

20 CHINA—UNITED STATES. Exchanged ratifications of treaty regulating tariff relations, signed July 25, 1928. *Press notice*, Feb. 20, 1929. Text: *U. S. Treaty Series*, no. 773.

20 NORWAY—UNITED STATES. Signed arbitration treaty. *U. S. Daily*, Feb. 21, 1929, p. 2. *Press notice*, Feb. 20, 1929.

20 SAMOAN ISLANDS. President Coolidge signed S. J. Resolution 110 providing for accepting, ratifying and confirming cession of certain islands of the Samoan group to the United States. *Pub. res. no. 89, 70th Cong., 2d sess.*

21 GREAT BRITAIN—PANAMA. Exchanged ratifications of agreement of Sept. 26, 1928, regarding treatment of commercial travelers and their samples. *G. B. Treaty Series*, no. 11 (1929), *Cmd.* 3321.

22 BELGIAN-LUXEMBURG ECONOMIC UNION—CHINA. Exchanged ratifications of preliminary commercial agreement of Nov. 28, 1928. *U. S. C. R.*, May 6, 1929, p. 365.

22 *to May* 10 CHINA. Nationalist forces clashed with anti-nationalists in first battle of new Shantung uprising. *N. Y. Times*, Feb. 22, 1929, p. 1. *Cur. Hist.*, May, 1929, p. 352. Armistice arranged on May 10. *N. Y. Times*, May 11, 1929, p. 5.

22 GERMANY—LITHUANIA. Exchanged ratifications of commercial treaty signed at Kovno on Feb. 19, 1929. *U. S. C. R.*, April 15, 1929, p. 187.

23 COLOMBIA—UNITED STATES. Identic notes signed in Washington giving reciprocal rights to commercial aircraft to fly over Panama Canal Zone and Colombian Territory. *N. Y. Times*, Feb. 24, 1929, p. 14. *U. S. Daily*, Feb. 26, 1929, p. 2.

25 BULGARIA—YUGOSLAVIA. Conference opened at Pirot with object of bringing about a normal situation on the frontier. *B. I. N.*, Mar. 2, 1929.

25 GERMANY—UNITED STATES. Exchanged ratifications of treaty of arbitration signed in Washington May 5, 1928. *U. S. Daily*, Feb. 27, 1929, p. 3. *U. S. Treaty Series*, no. 774.

25. GERMANY—UNITED STATES. Exchanged ratifications of treaty of conciliation signed at Washington May 5, 1928. *U. S. Daily*, Feb. 27, 1929, p. 3. *U. S. Treaty Series*, no. 774.

25 LEAGUE OF NATIONS PORTS AND MARITIME NAVIGATION COMMITTEE. Met in London, with representatives of nearly all the great maritime powers. *L. N. M. S.*, Mar. 15, 1929, p. 53.

26 ITALY—UNITED STATES. Signed agreement effective Mar. 1, 1929, whereby all American citizens traveling to Italy are relieved of necessity of having Italian visas on their passports. *Press notice*, Feb. 27, 1929.

27 ESTONIA—ITALY. Exchanged ratifications of economic agreement signed July 1, 1928. *World trade*, April, 1929, p. 344.

27 ESTONIA—ITALY. Exchanged ratifications of provisional most-favored-nation commercial treaty of Jan. 1, 1928. *U. S. C. R.*, April 22, 1929, p. 242.

28 AUSTRIA—UNITED STATES. Exchanged ratifications of arbitration treaty of Aug. 16, 1928. *U. S. Treaty Series*, no. 776.

28 AUSTRIA—UNITED STATES. Exchanged ratifications of conciliation treaty of Aug. 16, 1928. *U. S. Treaty Series*, no. 777.

28 HUNGARY—SPAIN. Signed agreement at Budapest modifying commercial convention of June 17, 1925, effective April 1, 1929. *U. S. C. R.*, May 13, 1929, p. 433.

28 *and March* 30 NORWAY—UNITED STATES. Signed parcel post convention. *M. B. T. I.*, May 1, 1929.

March, 1929

1 AUSTRIA—FRANCE. Exchanged ratifications of commercial treaty signed May 16, 1928. *J. O.*, Mar. 10, 1929, p. 2835. *U. S. C. R.*, April 29, 1929, p. 302.

1 NATURALIZATION LAWS. House Resolution 16440, relating to declaration of intention in naturalization proceedings, approved by President Coolidge. *Pub. no. 1011, 70th Cong., 2d sess.*

1 NICARAGUA CANAL. Senate Joint Resolution 117, authorizing survey of cost of additional locks and other facilities at the Panama Canal, and of probable cost of constructing a canal across the Republic of Nicaragua, approved by President Coolidge. *Pub. Res. no. 99, 70th Cong., 2d sess.*

1 PORTUGAL—UNITED STATES. Signed arbitration treaty in Washington. *Press notice*, Mar. 1, 1929.

1 RADIO CHANNELS. At conference held in Ottawa, by representatives of United States, Canada, Cuba and Newfoundland to discuss allocation of short wave radio

channels on North American continent, an arrangement was reached which came into force on Mar. 1, 1929. *M. B. T. I.*, May 1, 1929.

3 MEXICAN REBELLION. Revolution was proclaimed by General Aguirre, military commander of State of Vera Cruz, and endorsed by other leaders in Manifesto issued on March 4. President Portes Gil appointed ex-President Calles as secretary of war to handle the emergency. On March 5, President Hoover decided to continue President Coolidge's policy of permitting sale of arms to Mexican Federal government. On March 11, Secretary Kellogg announced that the belligerents would not be recognized as such by the United States government. *Cur. Hist.*, April–May, 1929, pp. 140 and 320. On May 7, following collapse of revolt, the United States troops on emergency duty along Mexican frontier were ordered home. *N. Y. Times*, May 8, 1929, p. 3.

4–9 LEAGUE OF NATIONS COUNCIL. Fifty-fourth session held in Geneva to consider mandates, minorities, Anglo-Irak judiciary agreement of Mar. 25, 1924, etc. Decided that first Conference on codification of international law should be held at The Hague in the spring of 1930, and instructed the Preparatory Committee to submit suggestions regarding general rules to govern work of the Conference. *L. N. M. S.*, April 15, 1929. *Times* (London), Mar. 5–11, 1929.

6 BULGARIA—TURKEY. Signed treaty of arbitration at Sofia in settlement of grievances of Turkish minority in Bulgaria, dating from the war of 1912–13. *B. I. N.*, Mar. 16, 1929. *Times* (London), Mar. 13, 1929, p. 15.

6 *and April* 2 GOLD COAST COLONY—UNITED STATES. Signed parcel post convention. *M. B. T. I.*, May 1, 1929.

8 PARAGUAY—SPAIN. Extension announced for one year of commercial modus vivendi of Feb. 18, 1927. *U. S. C. R.*, April 15, 1929, p. 187.

8 VISA CONFERENCE. Delegates from 20 nations, including the United States, met at Paris to discuss abolition of visa fees. *N. Y. Times*, Mar. 9, 1929, p. 4.

9 AMERICAN INSTITUTE OF INTERNATIONAL LAW. President of Cuba signed Decree no. 339 in virtue whereof a Palace to house the American Institute of International Law will be erected in Havana at expense of Cuban government. Text: *Gaceta oficial* (Havana), Mar. 12, 1929.

9 FINLAY, VISCOUNT. Judge on the Permanent Court of International Justice, died in London. *Times* (London), Mar. 11, 1929, p. 21.

9 HUNGARY—ITALY. Commercial and navigation treaty of July 4, 1928, came into force in Italy. *World trade*, April, 1929, p. 345.

10 FRANCE—ITALY. Signed air convention in Turin. *Times* (London), Mar. 12, 1929, p. 15.

11–13 ARMS TRAFFIC. Committee of Experts, composed of representatives from all the delegations to the Preparatory Disarmament Committee, met at Geneva, and examined and rejected the Belgian proposals for government control of private manufacture of arms. *Wash. Post*, Mar. 14, 1929, p. 2. *B. I. N.*, Mar. 16, 1929, p. 23. *L. N. M. S.*, April 15, 1929.

11 FRANCE—GREECE. Signed new commercial agreement at Athens replacing treaty of Sept. 8, 1926, effective April 1, 1929. The new agreement providing mutual most-favored-nation treatment, revises list of tariff concesssions granted by the two countries. *U. S. C. R.*, May 13, 1929, p. 433.

11–14 INTERNATIONAL RELATIONS STUDY CONFERENCE. Second conference of Institute for the study of international relations held in London. *La Coopération intellectuelle*, April 15, 1929, p. 197–201.

11 PERSIA—RUSSIA. Signed customs agreement valid for seven years. *B. I. N.*, Mar. 16, 1929.

13 BELGIUM—EGYPT. Treaty of commerce and navigation of June 24, 1891, denounced by Egypt. *B. I. N.*, Mar. 30, 1929.

13 GERMAN REPARATIONS. On March 9, the Committee of Experts meeting in Paris under chairmanship of Owen D. Young, gave to the press, summary of tentative proposals for establishment of an international banking institution. *N. Y. Times*, Mar. 10, 1929, p. 1. On March 13, three reports concerning the project were submitted to the Committee. *N. Y. Times*, Mar. 14, 1929, p. 5. *Cur. Hist.*, May, 1929, p. 307. On April 13, the creditor powers presented to Dr. Schacht, of the German delegation, a memorandum of minimum demands of former allies against Germany, signed by representatives of France, Great Britain, Belgium and Italy, providing for payment of annuities over a period of 58 years. Summary: *N. Y. Times*, April 14, 1929, p. 1. On April 17, Dr. Schacht presented Germany's proposal to pay $396,000,000 per year, to run for 37 years only, and not 58 years as Allies demanded. *N. Y. Times*, April 18, 1929, p. 1. On May 4, Owen D. Young presented outline of suggestions for possible agreement, and meeting adjourned to consider the plan. *N. Y. Times*, May 7, 1929, p. 1.

13 PHILLIMORE, LORD. Died in London, aged 83. *N. Y. Times*, Mar. 14, 1929, p. 27.

14 CHINA—GREAT BRITAIN. Exchanged ratifications in London of treaty relating to Chinese customs tariff signed Dec. 20, 1928. Text: *G. B. Treaty Series*, no. 10 (1929), *Cmd.* 3319.

14 VATICAN AGREEMENT. Texts of Lateran treaty, concordat and financial convention of Feb. 11, 1929, together with Premier Mussolini's report, were made public. *N. Y. Times*, Mar. 15, 1929, p. 3. *Cur. Hist.*, May, 1929, p. 339. *Living Age*, May, 1929, p. 16. Texts: (English) *Catholic Standard and Times* (Philadelphia), Mar. 16, 1929. (French) *Revue du droit* (Quebec), April, 1929, p. 452.

15 AUSTRIA—ICELAND. Exchanged ratifications of most-favored-nation commercial treaty signed April 6, 1928. *U. S. C. R.*, May 13, 1929, p. 433.

15 ESTONIA—FRANCE. Signed commercial most-favored-nation treaty in Paris. *U. S. C. R.*, April 15, 1929, p. 187.

17 EGYPT—GREAT BRITAIN. Agreement relative to Ottoman guaranteed loan of 1855 and other financial questions signed at Cairo. Text: *G. B. Treaty Series*, no. 7 (1929), *Cmd.* 3305.

17 GREECE—YUGOSLAVIA. Signed pact of friendship, conciliation and judicial settlement at Belgrade; also protocols (1) service at port of Salonica; (2) railway services; (3) customs service; (4) postal, telegraph and telephone service; (5) veterinary service; (6) final protocol. Railway convention. Texts: *Europe*, April 20, 1929, p. 519.

20 BELGIUM—UNITED STATES. Signed treaty of arbitration and treaty of conciliation. *Wash. Post.* Mar. 21, 1929, p. 9. *U. S. Daily*, Mar. 21, 1929, p. 1.

20 DANUBE COMMISSION. Special committee of the League met with delegates of governments represented on European Commission of the Danube (Great Britain, Rumania, France, and Italy) and reached agreement regarding powers of Commission over the Braila-Galatz section of the river. Summary of agreement: *L. N. M. S.*, April 15, 1929, p. 81.

21 GREECE—POLAND. Pending conclusion of a new commercial agreement to replace the one of April 17, 1925, denounced by Greece in June, 1928, the Greek government published a decree extending application of minimum tariff rates to Poland up to May 31, 1929, under condition of reciprocity. *U. S. C. R.*, May 13, 1929, p. 433.

21 PERMANENT COURT OF ARBITRATION. Sir Cecil Hurst selected to succeed Lord Finlay as British delegate. *Times* (London), Mar. 22, 1929, p. 17.

21 RUMANIA—UNITED STATES. Signed treaties of conciliation and arbitration. *Press notice*, Mar. 21, 1929.

21 SWEDEN—TURKEY. Exchanged ratifications of most-favored-nation commercial treaty concluded on Feb. 4, 1928, treaty becoming effective on April 20, 1929. *U. S. C. R.*, May 13, 1929, p. 433.

22 GREAT BRITAIN—NETHERLANDS. Exchanged notes for settlement of claims of Dutch fishing industry arising out of the war. Text: *G. B. Treaty Series*, no. 9 (1929), *Cmd.* 3311.

22 IMMIGRATION. President Hoover proclaimed national origins basis of determining immigration quotas, effective July 1. *Wash. Post*, Mar. 23, 1929, p. 1. Text: *U. S. Daily*, Mar. 23, 1929, p. 1, 3.

22 LATIN ALPHABET. King Alexander of Yugoslavia issued order for use of Latin alphabet to replace Cyrillic characters which have been in use for the last thousand years. *N. Y. Times*, Mar. 23, 1929, p. 5.

27 CANADA—UNITED STATES. Signed treaty to conserve sockeye salmon fisheries of Fraser River System. This was first treaty concluded by Canada with the United States independently of Great Britain. *U. S. Daily*, Mar. 28, 1929, p. 1. *Press notice*, Mar. 27, 1929.

27 CHINA—SWEDEN. Most-favored-nation commercial treaty of Dec. 20, 1928, came into force. *U. S. C. R.*, May 6, 1929, p. 365.

28 ALBANIA—FRANCE. Signed treaty of commerce and navigation at Tirana providing for mutual most-favored-nation treatment. *B. I. N.*, April 13, 1929.

28 CHINA—JAPAN. Agreement settling Tsinan incident of May, 1928, signed at Tokyo, contained no mention of apologies or punishments; Shantung was to be evacuated by Japanese troops within two months; and a protocol on damages provided for joint commission to investigate damages suffered by both parties. *Times* (London), Mar. 30, 1929, p. 12. *Cur. Hist.*, May, 1929, p. 353. *Europe*, May 4, 1929, p. 586.

29 FRANCE—GREECE. Convention of commerce and navigation signed at Athens Mar. 11, 1929, promulgated and put into force in France. Text: *J. O.*, Mar. 30, 1929, p. 3717.

30 BELGIUM—FRANCE. Convention and protocol concerning unemployment indemnity in case of loss of ship, signed at Paris June 1, 1921, promulgated in France. Text: *J. O.*, April 25, 1929, p. 4763.

30 FRANCE—ITALY. Exchanged notes relative to prorogation to June 1, 1929, of modus vivendi of Dec. 3, 1927. *J. O.*, Mar. 31, 1929, p. 3802.

30 JAPAN—UNITED STATES. Exchanged memoranda concerning revision of tariff on lumber in Japan. *Press notice*, May 15, 1929.

April, 1929

1 RUSSIAN CITIZENS. Privilege of suing the United States denied to citizen of Union of Soviet Republics by U. S. Court of Claims in decision no. A 69 (Russian volunteer fleet v. the United States). *U. S. Daily*, April 4, 1929, p. 8.

2 BOLIVIAN-PARAGUAYAN CONCILIATION COMMISSION. Adopted procedure and decided to ask Bolivia and Paraguay to submit respective memorials. *U. S. Daily*, April 3, 1929, p. 1.

3–23 DOMINICAN REPUBLIC FINANCES. Committee of financial experts, under chairmanship of Gen. Charles G. Dawes, held conferences in Santo Domingo on reorganiza-

tion of economic and financial system of Dominican Republic. Report and recommendations for budget law presented to President Vasquez. *N. Y. Times*, April 4–24, 1929.

4–13 RADIO BROADCASTING CONFERENCE. Held at Prague with representatives from 24 nations. Agenda: *M. B. T. I.*, May 8, 1929.

6 LUXEMBURG—UNITED STATES. Signed treaty of arbitration and conciliation. *Press notice*, April 8, 1929.

8 CANADIAN LABOR. Denial of temporary entry to aliens seeking work in United States upheld by U. S. Supreme Court in opinion no. 198. Text: *U. S. Daily*, April 9, 1929, p. 9.

8 GREAT BRITAIN—PANAMA. Exchanged ratifications of treaty of commerce and navigation signed Sept. 25, 1928. *U. S. C. R.*, May 13, 1929, p. 433. *G. B. Treaty Series*, no. 12 (1929).

9–20 COUNTERFEITING OF CURRENCY. Convention and protocol were signed by 23 countries at conference in Geneva. *Press notice*, April 22, 1929. *Times* (London), April 22, 1929, p. 13. Text of summary of Information Section of League of Nations: *U. S. Daily*, May 7, 1929, p. 2.

11 CZECHOSLOVAKIA—UNITED STATES. Exchanged ratifications at Prague of arbitration and conciliation treaties signed at Washington Aug. 16, 1928. *M. B. T. I.*, May 1, 1929.

11 TURKEY—UNITED STATES. By exchange of notes, the reciprocal most-favored-nation treatment in customs matters was continued for one year. *U. S. C. R.*, April 22, 1929, p. 242.

12 MOTION PICTURES. Identic notes sent to France, Germany, Italy, Spain, Czechoslovakia, Austria and Hungary protesting against restrictions imposed upon American motion pictures. Text: *U. S. Daily*, April 15, 1929, p. 2. *Press notice*, April 12, 1929.

14 CHINA—JAPAN. General agreement reached for settlement of Nanking and Hankow incidents and in regard to treaty revision. *B. I. N.*, April 27, 1929.

15 LEAGUE OF NATIONS PREPARATORY COMMISSION ON DISARMAMENT. Opened sixth session at Geneva. Summary of first day's session: *U. S. Daily*, May 3, 1929, p. 2. Views of United States outlined by Ambassador H. S. Gibson, representative of the United States. Text: *Press notice*, April 22, 1929. *Times*, April 23, 1929, p. 11. Postponement of naval discussions agreed to by United States in Gibson's statement on May 6 when Committee adjourned to study American proposals as basis for further solution of problem. Text of Gibson's statement: *U. S. Daily*, May 7, 1929, p. 1. *N. Y. Times*, May 7, 1929, p. 1. On May 7, President Hoover announced intention of United States government to continue its efforts to obtain naval reductions. Text: *U. S. Daily*, May 8, 1929, p. 1.

15 SWEDEN—UNITED STATES. Exchanged ratifications of arbitration treaty signed Oct. 27, 1928. *U. S. Daily*, April 16, 1929, p. 3.

16 SAFETY AT SEA. International conference to revise convention of 1914 for safety of life at sea convened in London. *Times* (London), April 17, 1929, p. 13.

17 DENMARK—UNITED STATES. Exchanged ratifications of the treaty of arbitration signed at Washington, June 14, 1928. *M. B. T. I.*, May 6, 1929.

18 MONACO CONSTITUTION. Decree issued by the Prince of Monaco reëstablishing the Constitution of the Principality. *Times* (London), April 17, 1929, p. 15.

19 LITHUANIA—POLAND. Exchanged ratifications at Kovno of traffic treaty with Poland, signed Dec. 16, 1928. *B. I. N.*, April 27, 1929.

21 *to May* 17 TACNA ARICA. Official statements of Chile and Peru delivered to Department of State on April 21 covering principal points for a treaty in settlement of controversy. *N. Y. Times*, May 6, 1929, p. 7. On May 7, Bolivia filed with State Department protest against proposed solution. *Wash. Post*, May 8, 1929, p. 2. On May 17, President Hoover announced settlement of the forty-year-old dispute. Text of President Hoover's proposals of May 14, and replies of Chile and Peru dated May 15–16, 1929: *U. S. Daily*, May 18, 1929, p. 1, 3.

22 CHEMICAL WARFARE CONFERENCE. Second session of International commission of experts for protection of civil populations against chemical warfare opened in Rome. *N. Y. Times*, April 23, 1929.

22 FRANCE—UNITED STATES. Exchanged ratifications of arbitration treaty of Feb. 6, 1928. *B. I. N.*, April 27, 1929. *M. B. T. I.*, May 1, 1929.

23 NATIONALITY LAWS FOR WOMEN. Council of National League of Women Voters passed resolution favoring right of married women to select their own nationality. *N. Y. Times*, April 24, 1929, p. 31.

24 CZECHOSLOVAKIA—FRANCE. Most-favored-nation commercial treaty of July 2, 1928, came into force. *J. O.*, April 24, 1929, p. 4722. *U. S. C. R.*, May 20, 1929, p. 501.

24 FRANCE—POLAND. Signed most-favored-nation commercial agreement. *U. S. C. R.*, May 6, 1929, p. 365.

24 WOOLSEY, THEODORE S. Died in New Haven, Conn., at age of 77. *N. Y. Times*, April 25, 1929, p. 29.

25 "I'M ALONE" CASE. Correspondence made public between Canada and the United States concerning sinking of Canadian schooner "I'm Alone" by the United States Coast Guard on Mar. 22, 1929. Text of notes of Mar. 28, April 9, 17, and 24 and Opinion of Attorney General William D. Mitchell dated April 4, 1929: *Press notice*, April 25, 1929. *Times*, April 26, 1929, p. 16. *U. S. Daily*, April 27, 1929, p. 2.

25 NETHERLANDS—UNITED STATES. Exchanged ratifications of treaty of arbitration signed at Washington Feb. 27, 1929, extending for one year the arbitration treaty of May 2, 1908. *M. B. T. I.*, May 1, 1929.

26 EMBARGO ON ARMS TO CHINA. Note cancelling the "Arms embargo agreement" of May 5, 1919, was sent to Nationalist Government of China, by the senior minister of the diplomatic body at Peking. The United States and other governments will henceforth permit export of arms to China through licenses to be issued at the request of the Chinese government. *U. S. Daily*, May 2, 1929, p. 1. *Press notice*, May 1, 1929. *Times* (London), April 26, 1929, p. 16.

27 EXTRA-TERRITORIALITY IN CHINA. Nanking Government addressed note to Great Britain, Holland, France, Norway, Brazil and the United States, requesting them to authorize their respective ministers to take up with National Government the question of abolition of extra-territoriality in China. Text: *Times* (London), May 7, 1929, p. 15.

May, 1929

2 FRANCE—UNITED STATES. Exchanged ratifications of supplementary extradition convention in Paris. *U. S. Daily*, May 10, 1929, p. 2.

6 LEAGUE OF NATIONS CONSULTATIVE ECONOMIC COMMITTEE. Opened second session in Geneva. *Times* (London), May 7, 1929, p. 15.

7 EGYPT—GREAT BRITAIN. Agreement on division of waters of the Nile reached by exchange of notes. Text: *Times* (London), May 8–9, 1929, p. 15.

10 GREECE—UNITED STATES. Greek debt settlement act signed on Feb. 10 by President Coolidge. *Pub. no. 747, 70th Cong., 2d sess.* On May 10, Secretary Mellon and the Minister of Greece signed agreement refunding the debt of $18,000,000 and providing a new loan of $12,000,000. *U. S. Daily*, May 11, 1929, p. 1.

11 IRISH FREE STATE—VATICAN. Announced that diplomatic relations are to be established. *N. Y. Times*, May 12, 1929, II, 1.

13 FRANCE—UNITED STATES. Reached agreement on reducing French visa fee from $10 to $2 and extending life of the visa from one to two years. *N. Y. Times*, May 14, 1929, p. 1.

13 PERMANENT COURT OF INTERNATIONAL JUSTICE. Sixteenth session of the Court opened, with Charles Evans Hughes sitting on the bench for first time as judge. *N. Y. Times*, May 14, 1929, p. 2.

16 CANADA—UNITED STATES. Correspondence made public on subject of commercial smuggling across the international boundary. Text of statement of American delegation at Ottawa conference, and notes exchanged: *U. S. Daily*, May 17, 1929, p. 2.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Madrid, Nov. 1, 1926.
Ratification: Costa Rica. Nov. 22, 1928. *P. A. U.*, Mar., 1929, p. 271.

AGRICULTURAL WORKERS' ASSOCIATION. Geneva, Nov. 12, 1921.
Ratification: France. Mar. 15, 1929. *J. O.*, Mar. 20, 1929, p. 3258.

ARMS TRAFFIC. Protocol on Chemical Warfare. Geneva, June 17, 1925.
Signature: Yugoslavia. April 15, 1929. *B. I. N.*, April 27, 1929.
Ratification: Turkey. *B. I. N.*, April 27, 1929.

ASYLUM CONVENTION. Havana, Feb., 1928.
Ratification: Panama. *P. A. U.*, April, 1929, p. 387.

BONES EXPORT. CONVENTION AND PROTOCOL. Geneva, July 11, 1928.
Signatures:
Bulgaria. Dec. 20, 1928.
Sweden. Dec. 19, 1928.
Turkey. Dec. 27, 1928. *L. N. O. J.*, Feb., 1929, p. 261.

CIVIL WAR. Havana, Feb. 20, 1928.
Ratification: Panama. Dec. 1, 1928. *P. A. U.*, Mar., 1929, p. 272.

COMMERCIAL AVIATION CONVENTION. Havana, Feb. 20, 1928.
Ratification: Panama. Nov. 12, 1928. *P. A. U.*, Mar., 1929, p. 272.

CONGO (General Act of Berlin), Feb. 26, 1885. Revision, Saint Germain-en-Laye, Sept. 10, 1919.
Ratification: Italy. Mar. 4, 1929. *World trade*, April, 1929, p. 344.

CONSULAR AGENTS. Havana, Feb. 20, 1928.
Ratification: Panama. Nov. 16, 1928. *P. A. U.*, Mar., 1929, p. 272.

COPYRIGHT CONVENTION. Buenos Aires, Aug. 11, 1910. Amendment. Havana, Feb., 1928.
Ratification: Panama. *P. A. U.*, April, 1929, p. 387.

DIPLOMATIC OFFICERS. Havana, Feb., 1928.
Ratification: Panama. *P. A. U.*, April, 1929, p. 387.

EIGHT-HOUR DAY. Washington, Nov. 28, 1919.
Ratification: Spain. *B. I. N.*, Mar. 16, 1929.

FOREIGNERS CONDITION. Havana, Feb. 20, 1928.
Ratification: Panama. Nov. 12, 1928. *P. A. U.*, Mar., 1929, p. 272.

GENERAL ACT. Geneva, Sept. 26, 1928.
Accession: Sweden. May 14, 1929. *N. Y. Times*, May 15, 1929, p. 7.

HIDES AND SKINS. Convention and Protocol. Geneva, July 11, 1928.
Signatures:
Bulgaria. Dec. 20, 1928.
Sweden. Dec. 19, 1928.
Turkey. Dec. 27, 1928. *L. N. O. J.*, Feb., 1929, p. 261.

LIQUOR TRAFFIC IN AFRICA. Saint Germain-en-Laye, Sept. 10, 1919.
Ratification: Italy. Mar. 4, 1929. *World trade*, April, 1929, p. 344.
Ratification deposited: United States. Mar. 22, 1929. *U. S. Treaty Series*, no. 779.

NAVIGABLE WATERWAYS CONVENTION. Protocol. Barcelona. April 20, 1921.
Accession: Bermuda. Dec. 27, 1928. *L. N. O. J.*, Feb., 1929, p. 262.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Ratification deposited: Hungary. Feb. 12, 1929. *M. B. T. I.*, May 1, 1929.

PAN AMERICAN CONCILIATION. Washington, Jan. 5, 1929.
Proclamation: United States. April 4, 1929. *U. S. Treaty Series*, no. 780.

PAN AMERICAN SANITARY CODE. Havana, Nov. 14, 1924. Additional Protocol. Lima, Oct. 19, 1927.
Ratifications:
Panama. Nov. 12, 1928. *P. A. U.*, March, 1929, p. 272.
Mexico. Jan. 3, 1929. *P. A. U.*, April, 1929, p. 386.

PAN AMERICAN UNION. Havana, Feb. 18, 1928.
Ratification: Dominican Republic, Dec. 4, 1928. *P. A. U.*, April, 1929, p. 386.

POSTAL CONVENTION AND PROTOCOL. Mexico, Nov. 9, 1927.
Ratification: Guatemala. *P. A. U.*, April, 1929, p. 386.
Ratification deposited: Chile. July 14, 1928. *P. A. U.*, April, 1929, p. 385.

PRIVATE INTERNATIONAL LAW. Havana, Feb. 13, 1928.
Ratifications:
Peru. Dec. 27, 1928. *P. A. U.*, March, 1929, p. 272.
Dominican Republic. Nov. 27, 1928. *P. A. U.*, April, 1929, p. 386.

PUBLIC HEALTH. Rome, Dec. 9, 1907.
Adhesion: Germany. Sept. 11, 1928. *M. B. T. I.*, May 1, 1929.

RADIOTELEGRAPH CONVENTION. Washington, Nov. 25, 1927.
Ratification: Mexico. Jan. 2, 1929. *P. A. U.*, April, 1929, p. 387.
Ratification deposited: Australia. April 3, 1929. *M. B. T. I.*, May 1, 1929.

RELIEF UNION. Geneva, July 12, 1927.
Accession: New Zealand. Dec. 22, 1928. *L. N. O. J.*, Feb., 1929, p. 262.
Ratification: India. *B. I. N.*, April 13, 1929.

RENUNCIATION OF WAR. Paris, Aug. 27, 1928.
List of adhesions, ratifications, etc., issued by State Department. *M. B. T. I.*, May 8, 1929. *Press notice*, May 6, 1929.
Ratification deposited: China. May 8, 1929. *U. S. Daily*, May 9, 1929, p. 3.

SANITARY CONVENTION. Paris, Jan. 17, 1912. Revision. Paris, June 21, 1926.
Ratification deposited: Russia. Feb. 26, 1929. *M. B. T. I.*, May 1, 1929.

SLAVE TRADE, ETC. Brussels, July 2, 1890. Revision, Saint Germain-en-Laye, Sept. 10, 1919.
Ratification: Italy. Mar. 4, 1929. *World trade*, April, 1929, p. 344.

SLAVERY CONVENTION. Geneva, Sept. 25, 1926.
Ratifications deposited:
Germany. Mar. 12, 1929. *B. I. N.*, Mar. 16, 1929, p. 19. *M. B. T. I.*, May 1, 1929.
United States. Mar. 21, 1929. *U. S. Treaty Series*, no. 778.

SOVIET ANTI-WAR PROTOCOL. Moscow, Feb. 9, 1929.
Adhesion: Turkey. Feb. 27, 1929. *Soviet Union R.*, April, 1929, p. 57.

SOVIET ANTI-WAR PROTOCOL. Moscow, Feb. 9, 1929.
Ratifications:
Estonia. Mar. 8, 1929. *B. I. N.*, Mar. 16, 1929.
Latvia. Feb. 26, 1929.
Lithuania. April 5, 1929. *B. I. N.*, April 13, 1929.
Rumania. Feb. 22, 1929. *B. I. N.*, Mar. 2, 1929.
Turkey. April 2, 1929. *B. I. N.*, April 13, 1929.

SPITZBERGEN. Paris, Feb. 9, 1920.
Adhesion: Chile. Mar. 28, 1929. *M. B. T. I.*, May 1, 1929.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

SUPREME COURT OF THE UNITED STATES

KARNUTH *et al. v.* UNITED STATES *et al.*

April 8, 1929

The provision of Art. III of the Jay Treaty of 1794, stipulating for the free passage of British subjects and United States citizens over the boundary line between their respective territories on the continent of America was brought to an end by the War of 1812, leaving the contracting Powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

In the agreement in Art. XXVIII of the treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in duration to twelve years," the word "permanent" was used to differentiate the first ten articles from the subsequent articles. It was not employed as a synonym for "perpetual" or "everlasting."

The Immigration Act of 1924 includes in the term "immigrant" every alien coming to the United States either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions enumerated in the statute. The word "business" as used in §3(2) of the act, excepting from the definition of the term "immigrant" an alien visiting the United States temporarily for business, must be limited in application to intercourse of a commercial character. Aliens temporarily visiting the United States for the purpose of performing labor for hire are not within the purview of the exception and may be denied admission by the immigration authorities on the ground that they are quota-immigrants within the meaning of the Act. Validity of departmental regulation to this effect sustained.

Mr. Justice SUTHERLAND delivered the opinion of the court.

This case arose under § 3 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 154, U. S. Code, Title 8, § 203, *et seq.*, which provides: "When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, . . ." The complete section, together with other pertinent provisions of the act, are copied in the margin.[1]

[1] Sec. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Sec. 4. When used in this Act the term "non-quota immigrant" means—

. . . . .

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal

Neither respondent is a native of Canada. Mary Cook, is a British subject, born in Scotland, who came to Canada in May, 1924. She is a spinner by occupation and resides at Niagara Falls, Ontario. Antonio Danelon is a native of Italy, who came to Canada in 1923. He also resides at Niagara Falls, Ontario. He alleges that he became a Canadian citizen by reason of his father's naturalization. Both sought admission to the United States on December 1, 1927, as non-immigrants under the excepting clause (2) above quoted. Prior thereto, Mary Cook had crossed from Canada to the United States daily for a period of three weeks to engage in work at which she was employed. On the occasion in question, she was out of employment, but desired admission to look for work. Danelon had been at work in the United States for more than a year, crossing daily by the use of an identification card. He sought admission to resume work. Both were denied admission by the immigration authorities, on the ground that they were quota-immigrants within the meaning of the act, and did not come within the excepting clause, § 3 (2). The following departmental regulation, adopted under § 24 of the act, has been in force since September, 1925. "Temporary visits . . . for the purpose of performing labor for hire are not considered to be within the purview of section 3 (2) of the act." It is not disputed that both aliens were properly excluded if the validity of this regulation is established.

In a habeas corpus proceeding, brought in behalf of the two aliens, the federal district court for the Western District of New York sustained the action of the immigration officials and dismissed the writ. On appeal, this judgment was reversed. The circuit court of appeals held that an alien crossing from Canada to the United States daily to labor for hire was not an immigrant but a visitor for business within the meaning of section 3 (2) of the act. 24 F. (2d) 649. In reaching that conclusion the court seemed of opinion that if the statute were so construed as to exclude the aliens, it would be in conflict with Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, a result, of course, to be avoided if, reasonably, it could be done. Lem Moon Sing *v.* United States, 158 U. S. 538, 549.

We granted the writ of certiorari because of the far-reaching importance

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Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him;

. . . . . .

Sec. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

Sec. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

of the question. The decision below affects not only aliens crossing daily from Canada to labor in the United States, but, if followed, will extend to include those entering the United States for the same purpose from all countries, including Canada, who intend to remain for any period of time embraced within the meaning of the word "temporary." By the immigration rules, this time is defined as a reasonable fixed period to be determined by the examining officer, which may be extended from time to time, though not to exceed one year altogether from the date of original entry. Thus, if the view of the court below prevail, it will result that aliens—not native of Canada or any other American country named in § 4 (c),—whose entry as immigrants is precluded, may land as temporary visitors and remain at work in the United States for weeks or months at a time.

First. The pertinent provision of Article III of the Jay Treaty follows:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. . . .

The position of the government is that (1) there is no conflict between the treaty and the statute, but, (2) in any event, the treaty provision relied on was abrogated by the War of 1812. We pass at once to a consideration of the second contention, since if that be sustained, the first becomes immaterial and the statute open to construction unembarrassed by the treaty.

The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." 5 Moore's Digest of International Law, § 779, p. 383. But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the

like, having a political character, the object of which "is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war. *Id.*, p. 385, quoting Calvo, Droit Int. (4th Ed.), IV. 65, § 1931.

In Society, etc. *v.* New Haven, 8 Wheat. 464, a case involving the right of a British corporation to continue to hold lands in Vermont, this court was called upon to determine the effect of the War of 1812 upon the ninth article of the Jay Treaty which provides

> That British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." 8 Stat. 116, 122.

It was held that the title to the property of the society was protected by the sixth article of the Treaty of 1783, 8 Stat. 80, 83; was confirmed by the words of Article IX above quoted; and was not affected by the War of 1812. The applicable rule was stated (p. 494) in the following words:

> But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.
>
> We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

The English High Court of Chancery reached the same conclusion in Sutton *v.* Sutton, 1 Russ. & M. 663, 675:

> The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the

> ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, § 1135; 2 Hyde, International Law, § 606. The reasons for the conclusion are obvious —among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture.

It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject:

> Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace, —frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take

> them to be all annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace. (Hall, International Law (5th Ed.), pp. 389–390.)

Westlake classifies treaties not affected by war as (1) those providing what is to be done in a state of war, (2) transitory or dispositive treaties, including such as are intended to establish a permanent condition of things, such as treaties of cession, boundary, and recognition of independence, as well as those having no conceivable connection with the causes of war or peace, and (3) treaties establishing arrangements to which third Powers are parties such as guarantees and postal and other unions. Westlake, International Law, Part II, pp. 29–32. He then says:

> Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to reenter the domain of law.

Fauchille, *Traité de Droit International Public*, 1921, Vol. II, p. 55, says that

> A state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs union, etc. Those treaties from their very nature are subject to an implicit resolutory condition, namely a break in the state of peace. They cannot survive the outbreak of hostilities between the signatory States. War, to them, is a cause of final extinction and not of mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless expressly renewed in the peace treaty."[2]

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting Powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

[2] . . . *résolus* par l'état de guerre les traités conclus en vue de relations pacifiques entre les signataires et ayant pour objet ou pour but la consolidation ou le maintien de ces relations pacifiques. *Ex:* les traités d'alliance, de subsides, de garantie, de commerce, de navigation, d'union douaniére, etc. Ces traités sont par leur nature même affectés d'une condition résolutoire implicite, la cessation de l'état de paix. Ils ne peuvent pas survivre à l'ouverture des hostilités entre les Etats signataires. La guerre est pour eux une cause d'extinction définitive, et non une cause de simple suspension. La paix conclue, ils ne sortent pas spontanément d'un état de léthargie momentané: ils ne revivent pas, à moins qu'ils no soient expressément renouveles dans le traité de paix.

We are not unmindful of the agreement in Article XXVIII of the treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years." It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting," but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. See Texas, &c. Railway Co. *v.* Marshall, 136 U. S. 393, 403; Bassett *v.* Johnson, 2 N. J. Eq. 154, 162.

It is true, as respondents assert, that citizens and subjects of the two countries continued after the War of 1812, as before, freely to pass and repass the international boundary line. And so they would have done if there never had been a treaty on the subject. Until a very recent period, the policy of the United States, with certain definitely specified exceptions, had been to open its doors to all comers without regard to their allegiance. This policy sufficiently accounts for the acquiescence of the government in the continued exercise of the crossing privilege upon the part of the inhabitants of Canada, with whom we have always been upon the most friendly terms; and a presumption that such acquiescence recognized a revival of the treaty obligation cannot be indulged.

Second. In construing § 3 (2) of the Immigration Act, we are not concerned with the ordinary definition of the word "immigrant" as one who comes for permanent residence. The act makes its own definition, which is that "the term 'immigrant' means any alien departing from any place outside the United States destined for the United States." The term thus includes every alien coming to this country either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions. The only exception pertinent to the present case is the second, quoted at the beginning of this opinion, namely, an alien visiting the United States "temporarily for business or pleasure." The contention is that respondents were temporary visitors for business; and the case is, therefore, narrowed to the simple inquiry whether the word "business," as used in the statute, includes ordinary work for hire. The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. It may be so used as either to include or exclude labor; "for though labor may be business, it is not necessarily so, and the converse is equally true, that business is not always labor." Bloom *v.* Richards, 2 Oh. St. 387, 396. The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment. See Heydenfeldt *v.* Daney Gold, etc. Co., 93 U. S. 634, 638; Holy Trinity Church *v.* United States, 143 U. S. 457, 463; Ozawa *v.* United States, 260 U. S. 178, 194.

The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. In the report of the House Committee to accompany the bill which become the Quota Act of May 19, 1921 (H. of R. Report 4, 67th Congress, 1st Session), it was stated (p. 3) that one of the causes which called for the immediate passage of an act to restrict immigration was: "2. Large unemployment in the United States, making it impracticable for the United States to accept a heavy immigration." And further (p. 7): "In the opinion of a majority of the members of this committee the economic aspects of immigration alone call for the passage of this restrictive legislation, if there were not other reasons." In the Senate report upon the same bill (S. Report 17, 67th Congress, 1st Session, p. 4) one of the evils pointed out was that a large part of the new immigration had been of a migratory character, immigrants coming to the United States not so much for the purpose of permanent residence as to seek temporary profitable employment. The report of the House committee to accompany the bill which afterwards became the Act of 1924, now under consideration (H. of R. Report 350, 68th Congress, 1st Session), likewise makes clear that protection of American labor was one of the controlling reasons for further restriction of immigration. The committee, after pointing out that various suggested plans for admitting laborers and farmers had been rejected, said (p. 22): "As has been so often said with reference to the demand for the admission of laborers, the present gain is not worth the future cost."

In view of this definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with American workmen, whose protection it was one of the main purposes of the legislation to secure.

The word "business," as here used, must be limited in application to intercourse of a commercial character; and we hold that the departmental regulation, to the effect that temporary visits for the purpose of performing labor for hire are not within the purview of § 3 (2) of the act, is in accordance with the Congressional intent.

Judgment reversed.

UNITED STATES *v.* ROSIKA SCHWIMMER

May 27, 1929

Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native born citizens. All alike owe allegiance to the Government, and the Government owes to them the duty of protection. These are reciprocal obligations and each is a consideration for the other.

Aliens have no natural right to become citizens, but only that which is by statute conferred upon them, and statutes prescribing qualifications and governing procedure for admission are to be construed to favor and support the Government. The law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications.

That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution. The common defense was one of the purposes for which the people ordained and established the Constitution.

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government; and their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance.

A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization.

Mr. Justice BUTLER delivered the opinion of the Court.

Respondent filed a petition for naturalization in the District Court for the Northern District of Illinois. The court found her unable, without mental reservation, to take the prescribed oath of allegiance and not attached to the principles of the Constitution of the United States and not well disposed to the good order and happiness of the same; and it denied her application. The Circuit Court of Appeals reversed the decree and directed the District Court to grant respondent's petition. 27 F. (2d) 742.

The Naturalization Act of June 16, 1906 requires:

> He [the applicant for naturalization] shall, before he is admitted to citizenship, declare on oath in open court . . . that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same. U. S. C., Tit. 8, §381.
>
> It shall be made to appear to the satisfaction of the court . . . that during that time [at least 5 years preceding the application] he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. . . . §382.

Respondent was born in Hungary in 1877 and is a citizen of that country. She came to the United States in August, 1921, to visit and lecture, has resided in Illinois since the latter part of that month, declared her intention to become a citizen the following November, and filed petition for naturalization in September, 1926. On a preliminary form, she stated that she understood the principles of and fully believed in our form of government and that she had read, and in becoming a citizen was willing to take, the oath of allegiance. Question 22 was this: "If necessary, are you willing to take up arms in defense of this country?" She answered: "I would not take up arms personally."

She testified that she did not want to remain subject to Hungary, found the United States nearest her ideals of a democratic republic, and that she could whole-heartedly take the oath of allegiance. She said: "I cannot see that a woman's refusal to take up arms is a contradiction to the oath of

allegiance." For the fulfillment of the duty to support and defend the Constitution and laws, she had in mind other ways and means. She referred to her interest in civic life, to her wide reading and attendance at lectures and meetings, mentioned her knowledge of foreign languages and that she occasionally glanced through Hungarian, French, German, Dutch, Scandinavian, and Italian publications and said that she could imagine finding in meetings and publications attacks on the American form of government and she would conceive it her duty to uphold it against such attacks. She expressed steadfast opposition to any undemocratic form of government like proletariat, fascist, white terror, or military dictatorships. "All my past work proves that I have always served democratic ideals and fought—though not with arms—against undemocratic institutions." She stated that before coming to this country she had defended American ideals and had defended America in 1924 during an international pacifist congress in Washington.

She also testified: "If . . . the United States can compel its women citizens to take up arms in the defense of the country—something that no other civilized government has ever attempted—I would not be able to comply with this requirement of American citizenship. In this case I would recognize the right of the Government to deal with me as it is dealing with its male citizens who for conscientious reasons refuse to take up arms."

The district director of naturalization by letter called her attention to a statement made by her in private correspondence: "I am an uncompromising pacifist . . . I have no sense of nationalism, only a cosmic consciousness of belonging to the human family." She answered that the statement in her petition demonstrated that she was an uncompromising pacifist. "Highly as I prize the privilege of American citizenship I could not compromise my way into it by giving an untrue answer to question 22, though for all practical purposes I might have done so, as even men of my age—I was 49 years old last September—are not called to take up arms. . . . That 'I have no nationalistic feeling' is evident from the fact that I wish to give up the nationality of my birth and to adopt a country which is based on principles and institutions more in harmony with my ideals. My 'cosmic consciousness of belonging to the human family' is shared by all those who believe that all human beings are the children of God."

And at the hearing she reiterated her ability and willingness to take the oath of allegiance without reservation and added: "I am willing to do everything that an American citizen has to do except fighting. If American women would be compelled to do that, I would not do that. I am an uncompromising pacifist. . . . I do not care how many other women fight, because I consider it a question of conscience. I am not willing to bear arms. In every other single way I am ready to follow the law and do everything that the law compels American citizens to do. That is why I can take the oath of allegiance, because, as far as I can find out, there is

nothing that I could be compelled to do that I cannot do. . . . With reference to spreading propaganda among the women throughout the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that."

Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native born citizens. All alike owe allegiance to the Government, and the Government owes to them the duty of protection. These are reciprocal obligations and each is a consideration for the other. Luria *v.* United States, 231 U. S. 9, 22. But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government. And, in order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications. Tutun *v.* United States, 270 U. S. 568, 578. And see United States *v.* Ginsberg, 243 U. S. 472, 475.

Every alien claiming citizenship is given the right to submit his petition and evidence in support of it. And, if the requisite facts are established, he is entitled as of right to admission. On applications for naturalization, the court's function is "to receive the testimony, to compare it with the law, and to judge on both law and fact." Spratt *v.* Spratt, 4 Pet. 393, 408. We quite recently declared that: "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant." United States *v.* Manzi, 276 U. S. 463, 467. And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and

navy and of the militia of the several States when called into the service of the United States; it declares that a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. This Court, in the Selective Draft Law Cases, 245 U. S. 366, speaking through Chief Justice White, said (p. 378) that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . ."

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the "good order and happiness" of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.

The record shows that respondent strongly desires to become a citizen. She is a linguist, lecturer and writer; she is well educated and accustomed to discuss governments and civic affairs. Her testimony should be considered having regard to her interest and disclosed ability correctly to express herself. Her claim at the hearing that she possessed the required qualifications and was willing to take the oath was much impaired by other parts of her testimony. Taken as a whole it shows that her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms. Her expressed willingness to be treated as the government dealt with conscientious objectors who refused to take up arms in the recent war indicates that she deemed herself to belong to that class. The fact that she is an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Con-

stitution and policy of our government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization.

It is shown by official records and everywhere well known that during the recent war there were found among those who described themselves as pacifists and conscientious objectors many citizens—though happily a minute part of all—who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act.

The language used by respondent to describe her attitude in respect of the principles of the Constitution was vague and ambiguous; the burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act. She failed to do so. The District Court was bound by the law to deny her application.

The decree of the Circuit Court of Appeals is reversed.
The decree of the District Court is affirmed.

Mr. Justice HOLMES.

The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. It is agreed that she is qualified for citizenship except so far as the views set forth in a statement of facts "may show that the applicant is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and except in so far as the same may show that she cannot take the oath of allegiance without a mental reservation." The views referred to are an extreme opinion in favor of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see

how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to. And as to the opinion the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world. Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the Eighteenth Amendment should be repealed.

Of course the fear is that if a war came the applicant would exert activities such as were dealt with in Schenck *v.* United States, 249 U. S. 47. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.

Mr. Justice BRANDEIS concurs in this opinion.

Mr. Justice SANFORD, dissenting.

I agree, in substance, with the views expressed by the Circuit Court of Appeals, and think its decree should be affirmed.

WAR CLAIMS ARBITER

FUNCTIONING UNDER THE SETTLEMENT OF WAR CLAIMS ACT OF 1928

ADMINISTRATIVE DECISION NO. II

DEALING WITH BASES OF DETERMINING FAIR COMPENSATION IN PATENT CLAIMS

December 12, 1928

The Arbiter in passing upon all questions pertaining to the compensation, if any, to which claimants are entitled will consider them as clothed with all the rights of American citizens negotiating *de novo* with the Government of the United States for the sale, license, or use of the patented invention *as of* the time of such sale, license, or use, and will apply the rules and principles of American jurisprudence to each claim. The aim of the Arbiter will be to arrive at an amount which, in all probability, would have resulted from fair negotiation between a citizen of the United States who was willing to sell or license his patent, on the one part, and the Government of the United States which desired to buy the patent or to acquire the grant of a license, on the other part. Factors in determining compensation enumerated. Claims for compensation based on remote or consequential damages will not be considered.

As the *patent* on which a claim is based is in effect merely the evidence of a franchise granted by the United States conferring on the patentee the right to exclude others from making, using, or vending in the United States the thing patented without the permission of the patentee, it obviously can have no value for use beyond the territorial limits of the United States. But the patented *invention* may have an established market value in other countries.

The failure of patentees to give public notice of their patents as provided by Section 4900 of the Revised Statutes of the United States is not available as a defense to claims for use by or for the United States arising under paragraph (4) of Section 3 (b) of the Act.

PARKER, *Arbiter*, rendered the following decision:

Administrative Decision No. I [1] construed the several provisions of the Settlement of War Claims Act of 1928 dealing with patent claims, announced principles and rules governing the jurisdiction of the Arbiter in such claims, and dealt with some of the defenses with respect thereto put forward by the Government of the United States. The application of that decision has thus far resulted in the dismissal of numerous claims or parts of claims clearly not within the jurisdiction of the Arbiter.

The preparation of patent claims which are within the Arbiter's jurisdiction is progressing in accordance with the rules announced from time to time by the Arbiter. With a view to facilitating the completion of their preparation and early submission there are here set down general rules which will be applied in determining what constitutes "fair compensation" in patent claims.

Subsection (b) of section 3 of the Act provides that—

> It shall be the duty of the Arbiter . . . to hear the claims . . . and to determine the fair compensation to be paid by the United States, in respect of—
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> . . . . .
>
> (3) Any patent . . . which was licensed, assigned, or sold by the Alien Property Custodian to the United States. . . .

[1] Handed down October 31, 1928, Decisions and Opinions, War Claims Arbiter, pages 1–49. [Printed in this JOURNAL, January, 1929, p. 193.]

> (4) The use by or for the United States of any invention described in and covered by any patent . . . which was conveyed, transferred, or assigned to, or seized by, the Alien Property Custodian . . .

With respect to "Any patent . . . which was licensed, assigned, or sold by the Alien Property Custodian to the United States" dealt with in paragraph (3), the Act provides—

> Such compensation shall be the amount, as nearly as may be determined, which would have been paid if such patent . . . had been licensed, assigned, or sold to the United States by a citizen of the United States . . .

Under this broad and general mandate it is the duty of the Arbiter to determine the "fair compensation" to be paid by the United States in all claims properly before him for adjudication. The compensation must be "fair" both to the claimants and to the United States.

STATUS OF CLAIMANT AT PERTINENT TIME AS AFFECTING COMPENSATION

At the time of the sale, assignment, or license of the patents upon which these claims are based the claimants, or those under whom they claim, were citizens of nations with which the United States was then at war. If the claimant was then residing in Germany, Austria, or Hungary, and hence an alien enemy within the meaning of the United States Trading with the Enemy Act,[2] he was, on account of conditions arising out of the war, unable to deal with and use to advantage the patent granted him by the United States in the only place in which, because of its very nature, it could be used and dealt with, namely, in the United States. But this disability did not inhere in the patent itself, which is in effect but the evidence of a franchise granted by the United States conferring on the patentee "the right to exclude others from making, using, or vending the thing patented without the permission of the patentee." [3]

If the claimant was residing in the United States during the war and not by presidential proclamation designated as an "enemy," he was, prior to its seizure by the Custodian, at liberty to grant licenses, collect royalties, and generally to deal with his patent as he saw fit. While these patent rights were susceptible of use by the United States in the prosecution of the war, they could hardly be used within the United States by its enemies to its detriment, because the United States was in a position to prevent royalties or other income to the patentees from their use falling into the hands of its enemies to be used by them in the prosecution of the war. The underlying purposes of the Trading with the Enemy Act did not require that the United States should take measures directly designed to prevent the use of enemy-owned patented inventions in the United States by the patentees or

[2] 40 Stat. 411.

[3] United States Shoe Machinery Corporation *v.* United States (1922), 258 U. S. 451, 463.

anyone else. When, therefore, the Congress of the United States came to make provision for compensating these patent claimants it provided in effect that the disadvantages and disabilities, if any, under which the claimants labored at the pertinent time should be disregarded and, so far as determining fair compensation is concerned, the claimant should be clothed with all of the rights of an American citizen.

This is in striking contrast with the provisions of the Act for determining the fair compensation to be paid for German-owned ships, namely, their fair value to the German owner immediately prior to the time exclusive possession was taken by the United States, giving consideration to the fact that such owner could not use or permit the use of the vessel or charter or sell or otherwise dispose of it for use or delivery prior to the termination of the war. The reason for this distinction is that the ship was physical property which could be used as an instrument of warfare against the United States, and which, under recognized international law, could be detained or requisitioned if found on the outbreak of the war within the territorial waters of the United States. The value of the ships was directly affected by the facts that the ships were German-owned, that on the declaration of war they had been detained by the United States, that during the period of the war, so long as they were German-owned, they were not free ships or available for use. In these circumstances the Congress determined that "fair compensation" would be the fair value of the ships *to the owner*, taking into consideration the facts recited.

On the other hand, a patent dealt with in the Act is a mere franchise consisting of the right to exclude others from the use of an invention within the United States, and prior to their seizure by the Custodian no measures were taken directly to prevent the patentees from using or dealing with the patents. And when it came to fixing a basis for compensating the patent claimants the Congress in substance provided that the Arbiter should treat them as if they had been citizens of the United States at the time of the sale, license, or use of the patents upon which the claims are based.

GENERAL RULES

As pointed out in Administrative Decision No. I (at page 2), it must be borne in mind that the rights and remedies created and dealt with by the Act with respect to patent claims "pertain to the grant of a monopoly by the United States termed a patent, that such patents and all rights thereunder exist solely by virtue of the laws of the United States, and that their existence, their validity, their value, and everything pertaining thereto must be tested and measured solely by those laws."

The Arbiter in passing upon all questions pertaining to the compensation, if any, to which claimants are entitled will consider the claimants as clothed with all of the rights of American citizens negotiating *de novo* with the Government of the United States for the sale, license, or use of the patented

invention *as of* the time of such sale, license, or use, and will apply the rules and principles of American jurisprudence to each claim.

BASIC RULE

The phrase "as nearly as may be determined" as used in the Act is but a recognition of the fact that mathematical accuracy cannot be approximated in fixing fair compensation. But, considering all of the facts in each case, the aim of the Arbiter will be to arrive at an amount, as nearly as may be determined, which, in all probability, would have resulted from fair negotiation between a citizen of the United States who was willing to sell or license his patent, on the one part, and the Government of the United States which desired to buy the patent or to acquire the grant of a license, on the other part.[4]

In arriving at this amount the Arbiter will weigh all of the relevant facts as developed in each case with a view to determining (1) what a reasonably prudent and experienced person, duly authorized to represent the government, would have been willing to pay at the pertinent time, in the light of all of the then existing relevant facts and circumstances, and (2) what a reasonably prudent citizen of the United States would at that time have been willing to accept for the patent, license, or use in question in the light of the then existing relevant facts and circumstances, and (3) the amount which would have been arrived at as the result of such bargaining.

In reaching this amount neither the value to the owner of the patent nor the value to the United States alone will control. Both will be considered; and it will be assumed that all relevant facts and circumstances as they existed at the pertinent time would have been duly considered and weighed by both the willing seller and the willing buyer, and that as a result they would have arrived at an amount which one would have been willing to take and the other would have been willing to give.

TIME OF ESTIMATING VALUE

The patent sold, the license granted, or the uncompensated use, must all be valued as of the time of the sale, the time of the grant, or the time of the use as the case may be.[5] Values may vary—may increase or decrease—with changed conditions and the lapse of time, but fair compensation will be determined as of the time of the sale, license, or use.

INTEREST

In briefs submitted by several claimants reference is made to the element of interest which, it is contended, should be computed from the time of the

[4] Brooks-Scanlon Corporation *v.* United States (1924), 265 U. S. 106; Berdan Fire-Arms Manufacturing Co. *v.* United States (1890), 26 Court of Claims 48, 79, affirmed by the Supreme Court of the United States, 156 U. S. 552. See also Seaboard Air Line Railway Co. *v.* United States (1923), 261 U. S. 299.

[5] Pasqueau *v.* United States (1891), 26 Court of Claims 509.

sale, license, or use, to be included in the awards of the Arbiter as compensation. In support of this contention the decisions of the Supreme Court of the United States in the case of United States *v.* New River Collieries Co. (262 U. S. 341) and others are cited. The argument fails to take note of the fact that subsection (d) of section 3 of the Act provides for the making by the Arbiter of "a tentative award to each claimant of the fair compensation to be paid in respect of his claim, including simple interest, at the rate of 5 per centum per annum, on the amount of such compensation from July 2, 1921, to December 31, 1928, both dates inclusive." The Congress has expressly provided what interest shall be included in the tentative awards of fair compensation, and this *excludes* all other interest as an element of such compensation.

CLASSIFICATION OF CLAIMS

The foregoing general rules will be applied to all patent claims, which under the provisions of the statute, fall into three general classes, viz.:

(1) Those in which the Custodian sold or assigned a patent to the United States;

(2) Those in which the Custodian granted a license to the United States to use an invention disclosed by a patent; and

(3) Those in which uncompensated use was made by or for the United States of the invention disclosed by a patent which was seized by the Custodian but which had not been sold or licensed to the United States prior to such use.

Cases will probably be presented based both (1) on use by or for the United States prior to the purchase of the patent by it or prior to the grant of a license to it and (2) on such purchase or grant of license. Such claims are not conflicting but are supplementary, and both may be established under the statute.

FACTORS IN DETERMINING COMPENSATION

As an aid to counsel in the preparation and presentation of claims and in order to expedite their disposition there are here set down an enumeration of factors which must frequently be taken into account in the application of the general rules to claims falling within each of the categories above mentioned. This enumeration is intended to be neither exclusive nor all-inclusive but merely illustrative. Cases will perhaps be presented where factors not enumerated herein will be found applicable, and it is conceivable that other cases will be presented where the peculiar facts are such as to require that an enumerated factor be modified in its application to that case. It will be the duty of counsel to work out and present to the Arbiter all necessary refinements in connection with given statements of fact.

In arriving at the amount which would have resulted from fair bargaining between a citizen of the United States and a duly authorized representative

of the Government of the United States in determining the price of the patent, the license, or the use in question at the pertinent time, these factors should be considered:

(1) The condition of the prior art in the field of the invention;

(2) The extent of the contribution to the art by the invention;

(3) The remaining life of the patent at the pertinent time;

(4) All of the facts throwing light upon what an American citizen desiring either to sell the patent or to grant a license thereunder would have been willing to accept as a royalty for the use of his invention, and what royalty the Government of the United States would have been willing to pay. There may be considered hereunder:

(a) The amount of the fees or royalties received [6] where the German patent-owner prior to April 6, 1917, or the Austrian or Hungarian patent-owner prior to December 7, 1917, had been accustomed to grant licenses to practice the particular invention in the United States;

(b) The "reasonable royalty rule" may be applied where there is no established royalty for use of the particular invention in the United States and in its application the cost of manufacture, cost of marketing, sales prices, supply of substitutes, demand, the net profits which the patentee would probably have realized had he sold his products to the government,[7] and the like [8] may be considered;

(c) As the Government of the United States is not engaged in trade and commerce and does not manufacture and sell commercially, the so-called "standard of comparison rule" is peculiarly applicable in determining the amount of a reasonable royalty in this arbitration. This rule is applied by comparing the cost of using the patented device in question and the cost of using other available means of obtaining similar results, and a fair proportion of the saving thus effected may be taken into account in determining the amount of a reasonable royalty; [9]

[6] The substantial uniformity or absence thereof of such fees or royalties must be taken into account and they must be sufficient in number to justify the conclusion that a willing purchaser could afford to pay that price. Rude *v.* Westcott (1889), 130 U. S. 152. The sale of a single license is of but small probative value; Judson *v.* Bradford (1878), 3 Banning and Arden Patent Causes 549; Walker on Patents, 5th edition, section 557.

[7] Cornely *v.* Marckwald (1889), 131 U. S. 159; Rose *v.* Hirsh (1899), 94 Fed. 177; Underwood Typewriter Co. *v.* E. C. Stearns & Co. (1915), 227 Fed. 74, 82.

[8] Suffolk Manufacturing Co. *v.* Hayden (1866), 70 U. S. 315; Austin-Western Road Machinery Co. *v.* Disc Grader & Plow Co. (1923), 291 Fed. 301, 304; McKeever *v.* United States (1879), 14 Court of Claims 396, 425; Talbert *v.* United States (1890), 25 Court of Claims 141; Berdan Fire-Arms Manufacturing Co. *v.* United States (1890), 26 Court of Claims 48, 79, affirmed by Supreme Court of the United States, 156 U. S. 552.

[9] Sessions *v.* Romadka (1892), 145 U. S. 29, 45; Brickill *v.* Mayor, etc., of Baltimore (1894), 60 Fed. 98; Walker on Patents, sec. 725 *et seq.;* United States Frumentum Co. *v.* Lauhoff (1914), 216 Fed. 610. The advantage which is contemplated by this rule is the result of some superiority of the claimant's invention over the standard of comparison and that superiority may consist in the fact that the claimant's invention performs the

(5) The patent will be held *prima facie* valid. Where its validity is challenged by the Government of the United States the burden will be on it to rebut this presumption. The issue of validity will be taken into account in determining the compensation, if any, to which claimant may be entitled, and consideration will be given to the following:

(a) If the patent had been litigated and its validity sustained, this in itself would increase its market value;

(b) If the patent had been litigated and held invalid but not by a court of last resort, this would tend to decrease its market value;

(c) If the patent had been held invalid by a competent court of last resort prior to the pertinent time, then, for the purposes of this arbitration, it would have no value;

(d) If the validity of the patent has never been litigated but it should be challenged by the government and serious doubts raised with respect thereto, the weight of such doubts in overcoming the presumption of validity will be taken into account as a factor in determining the value of the patent for the purposes of this arbitration;

(6) The operativeness of the patent—the "know how" to operate the patented invention—should be ascertained through inquiring—

(a) Is the disclosure sufficient to permit of successful operation?

(b) The extent of the investment of capital and further experimentation, if any, necessary to convert the patented invention from a laboratory process to a commercial process;

(c) The existence or not in the United States at the pertinent time of skilled knowledge necessary to operate the patented invention;

(7) If the patent should cover only a part of a device or an improvement and not the entire device, an equitable apportionment of value will be made.[10] Where a royalty has been established for joint employment of all of the inventions covered by several patents, compensation for the use of part of these patents may be equitably assessed by dividing that royalty into parts proportionate to the value of the several inventions covered by the patents. But there must be evidence upon which to make such a division;[11]

(8) Where a part only of the inventions covered by a particular patent was used by the United States the compensation will be only for an equitable proportion of the royalty which had been or may be established for all of these inventions jointly; [12]

functions common to both with equal cheapness and greater excellence, or with greater cheapness and equal excellence, or with greater cheapness and greater excellence; and therefore the advantage may consist either in affirmative gain or in saving from loss or in both of these elements. Providence Rubber Co. *v.* Goodyear (1870), 76 U. S. 788; Mowry *v.* Whitney (1872), 81 U. S. 620, 651.

[10] Seymour et al. *v.* McCormick (1853), 57 U. S. 480; Merrell Soule Co. *v.* Powdered Milk Co. (1925), 7 Fed. (2d) 297.

[11] Porter Needle Co. *v.* National Needle Co. (1885), 22 Fed. 829; Walker on Patents, sec. 562.

[12] Willimantic Thread Co. *v.* Clark Thread Co. (1886), 27 Fed. 865.

(9) Where a claim falls under paragraph (3) of the Act inquiry should be directed and report made with respect to the probable extent at the pertinent time of the future use to be made of the patented invention by the United States. For convenience in the preparation and presentation of such claims they may be divided into three categories, viz.:

(a) Those cases where the invention covered by the patent was at the pertinent time of unquestioned value and use to the Government of the United States;

(b) Those cases where the invention covered by the patent was at the pertinent time of probable future interest to the Government of the United States but where it had no present use for it;

(c) Those cases where the invention covered by the patent was, at the pertinent time, of no interest to the Government of the United States and where neither a willing seller nor a willing buyer could foresee that the Government of the United States could ever have use for it. Even in cases falling under category (c) where the United States, occupying the position of a willing buyer, acquired a patent, or a license to use it which it retained and continues to retain, the claimant will be entitled to recover at least nominal compensation;

(10) In license cases falling under paragraph (3) of the Act the nature and scope of the license will be developed and reported. Numerous claims pending before the Arbiter are based on non-exclusive licenses granted to the United States by the Alien Property Custodian. A non-exclusive license does not pass any interest, legal or equitable, in the patent itself. It is merely a permission granted to the licensee to practice the invention and a covenant on the part of the owner of the patent not to sue the licensee for infringement during the period of the license, which is not assignable and does not confer any right on the licensee to grant licenses to others, which right is retained by the licensor;

(11) Where a claim falls under paragraph (4) of the Act inquiry should be directed and report made with respect to the extent of the actual use made by or for the United States. In such cases the compensation will ordinarily be determined on a royalty basis applied to the actual use; [13]

(12) In cases arising under paragraph (4) of the Act where it appears that the Government of the United States has merely, for the purpose of experimentation in an effort to test the utility and the practicability of a patented invention, manufactured without using or disposing of the products thereof, the claimant will not be entitled to compensation therefor;

[13] This group of cases does not involve compensation for property acquired but rather compensation for the use of the inventions without the acquisition of the right to use. These cases are analogous to patent infringement cases, and the decisions of the United States courts in such cases will guide in determining the amount of compensation to be awarded under paragraph (4). Suffolk Manufacturing Co. *v.* Hayden (1866), 70 U. S. 315; Dowagiac Manufacturing Co. *v.* Minnesota Moline Plow Co. (1915), 235 U. S. 641, 648; Austin-Western Road Machinery Co. *v.* Disc Grader & Plow Co. (1923), 291 Fed. 301, 304.

(13) Where a royalty basis is used in determining the value of a patent or license acquired by the United States from the Custodian, the compensation will ordinarily be computed by multiplying such royalty as may be fixed, by the determined extent of the use which would have appeared probable to a willing seller and a willing purchaser at the time of such acquisition, and reducing the result to a then present value basis;

(14) It is not possible to allocate to each factor any fixed or approximate percentage of influence, nor to give to it a weighted value, in determining the value of a particular patent or license or use of a patented invention. The facts found with respect to each factor must be considered in relation to the facts found with respect to all other factors, and the composite result weighed, in determining the value of the whole. The proof in each case must be reasonably definite—not wholly conjectural. The conclusion reached will be deduced from the facts, not from guesses.

REMOTE DAMAGES

Claims for compensation based on remote or consequential damages alleged to have been sustained by claimant because of the use of his invention by or for the Government of the United States will not be considered. The Arbiter will award fair compensation for use actually made by or for the United States, but all claims and evidence with respect to alleged pecuniary injury to a patentee in that the use of his invention by the Government of the United States resulted in raising up competitors and consequent loss in the reduction of his market, the encouragement of persons to infringe his patent, and the trouble and anxiety to which the patentee has consequently been subjected, and the like, will be rejected.

EVIDENCE OF VALUE IN FOREIGN COUNTRIES

As the *patent* on which a claim is based is in effect merely the evidence of a franchise granted by the United States conferring on the patentee the right to exclude others from making, using, or vending within the United States the thing patented without the permission of the patentee, it obviously can have no value for use beyond the territorial limits of the United States. But the patented *invention* may have a value—may have an established market value—in other countries. However, the differences in the laws of the United States and those of other countries governing the granting and protection of patents, which in many instances are substantial; the difference in the supply of and demand for the product of the invention; the difference in cost of production due to the difference in wages, prices of materials, and other factors; the difference in cost of marketing; the difference in the supply of available substitutes and the like in the United States as compared with foreign countries, will, in most cases, make evidence of the value of the patented invention in foreign countries of little if any assistance in determining its value in the United States. But the Arbiter's rules governing the

admissibility of evidence are not technical but are most liberal in the interest of arriving at the truth whatsoever form it may take, and where the claimant proffers evidence tending to establish the value in foreign countries of the patented invention, together with evidence of the conditions existing there as compared with those existing in the United States at the pertinent time, such evidence will be *admitted* for what it may be worth, and the *weight* to which it may be entitled will be determined by the Arbiter. In justice to the claimants they are here put on notice that ordinarily little weight will be given to evidence of this nature save in those exceptional cases where pertinent conditions in the United States and in the foreign country in question are shown to be similar. A case in point is one where governments are the only users of the particular invention [14] which has been sold or licensed to or used by or for the United States and which has also been sold or licensed to the foreign government.

WANT OF NOTICE UNDER SECTION 4900 OF UNITED STATES REVISED STATUTES AS A DEFENSE TO CLAIMS FOR USE BY OR FOR THE UNITED STATES ARISING UNDER PARAGRAPH (4) OF SECTION 3 (B) OF THE ACT

Counsel for the Government of the United States have raised a question with respect to the applicability of the provisions of section 4900 of the Revised Statutes of the United States (copied in the margin) [15] to cases involving use by or for the United States of patented inventions falling within paragraph (4) of subsection (b) of section 3 of the Act. In the concluding sentence of this paragraph it is provided that "any defense, general or special, available to a defendant in an action for infringement or in any suit in equity for relief against an alleged infringement, shall be available to the United States."

There seems to be no authority which in terms directly holds that the provisions of section 4900 of the Revised Statutes are available to the

[14] Berdan Fire-Arms Manufacturing Co. *v.* United States (1890), 26 Court of Claims, 48, 81, affirmed by Supreme Court of the United States, 156 U. S. 552.

[15] Section 4900 in its present form reads as follows:

"It shall be the duty of all patentees and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patent,' together with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice: *Provided, however,* That with respect to any patent issued prior to April 1, 1927, it shall be sufficient to give such notice in the form following, viz.: 'Patented,' together with the day and year the patent was granted; and in any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement and continued, after such notice, to make, use, or vend the article so patented."

Act of February 7, 1927, 44 Stat, 1058. The only change since 1870 was made by this 1927 statute in prescribing that the notices shall give the number instead of the day and year of the patent in cases of patents issued on or after April 1, 1927.

Government of the United States as a defense in any case. This statute was before the Supreme Court of the United States in the case of Dunlap *v.* Schofield (1894), 152 U. S., where, in construing it this language was used (page 247):

> The clear meaning of this section is that the patentee or his assignee, *if he makes or sells the article patented*, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article "patented," or to the particular defendants by informing them of his patent and of their infringement of it.

This language has not been modified by any subsequent decision of the Supreme Court of the United States. It seems by implication at least to support the view that section 4900 applies only to persons (patentees as well as those claiming for or under them) making or vending a patented article in the United States and introducing it into the channels of commerce, thereby inviting competition by reproduction, but without marking it "patented" and otherwise complying with the statutory requirements. There is authority directly supporting this view.[16] There are also cases to the contrary.[17]

As the Arbiter has reached the conclusion that section 4900 has no application to the cases pending before him, it is unnecessary for him to construe it. The reasons upon which this conclusion rests will be stated briefly.

When the Congress came to consider the Act of 1928 this was the situation with which it had to deal:

Under the National Defense Act of June 3, 1916, and even prior to its enactment, measures were taken looking to the mobilization of essential industries for war, and as these activities for defense increased the unlicensed uses of German-owned patents by or for the United States increased. After the entry of the United States into the war the United States used and induced or encouraged American manufacturers to use enemy-owned patents in production for its war requirements. This was deliberate with full knowledge of the fact that the use was without the license of the owners of the patents. Formal and express notice by the owners to the government of the existence of the patented inventions and of the infringements of which

[16] Campbell *v.* Mayor, etc., of City of New York (1897), 81 Fed. 182; Ewart Manufacturing Co. *v.* Baldwin Cycle-Chain Co. (1898), 91 Fed. 262; United States Mitis Co. *v.* Carnegie Steel Co. (1898), 89 Fed. 206, affirmed without opinion, 90 Fed. 829; United States Mitis Co. *v.* Midvale Steel Co. (1904), 135 Fed. 103, 112; Wagner *v.* Corn Products Refining Co., decided by District Judge Rellstab of the District of New Jersey on October 25, 1928, 28 Fed. (2d) 617.

[17] Churchward International Steel Co. *v.* Bethlehem Steel Co. (1919), 262 Fed. 438; Flat Slab Patents Co. *v.* Northwestern Glass Co. (1922), 281 Fed. 51; Flat Slab Patents Co. *v.* Turner (1922), 285 Fed. 257; Son *v.* Pressed Steel Car Co. (1927), 21 Fed. (2d) 528. It is worthy of note that in these cases with but one exception the patentee or licensee *actually manufactured* but failed either to mark or give notice in accordance with the statute.

the government was cognizant would have been both unnecessary and futile; unnecessary because the government already had knowledge of the facts which the notice would have conveyed;[18] futile because the use was a war use and the United States would have given no heed to such notice.

The use, being of a military nature involving the national defense, was in many instances as far as practicable deliberately kept secret. The patent-owners in such cases had no means of ascertaining that their patented inventions were being used by the United States. But had the patent-owners known of the use most of them because of their residence in enemy territory would have been prevented from giving the statutory notice by reason of the interruption of communications due to the existence of a state of war.

With knowledge of the unlicensed use of enemy-owned patents by the Government of the United States and by American manufacturers under pressure from it in the production of war materials and munitions, and pending the negotiation and coming into force of the Treaty of Berlin, the Act of March 3, 1921, was passed by the Congress of the United States for the purpose of protecting both the government and the American manufacturers against claims for such use of enemy-owned patents between August 1, 1914, and the date the statute became effective (March 3, 1921) where such use was by the Government of the United States or by any person acting on its behalf or under contract with it or with its assent. This was a war measure, justified as such.

Then the Treaties of Berlin, of Vienna, and of Budapest were negotiated and came into force, under which all of the acts of the Alien Property Custodian of the United States were confirmed and approved and "considered as final and binding upon all persons". As all of the patent claims within the Arbiter's jurisdiction are based on patents seized by the Custodian and as in seizing these patents the Custodian (generally if not always) took title to all claims of the patent-owners against the United States and others for their use or infringement, it follows that under these treaties the Custodian had, as a war measure, taken title to all (or nearly all) of the claims within the Arbiter's jurisdiction based on use of patented inventions by or for the United States and falling within paragraph (4) of section 3(b) of the Act.

With knowledge of all of these facts in mind the Congress passed the Act of 1928, the effect of which is to waive the protection afforded by the provisions of the treaties mentioned to the extent necessary to provide for the determination and payment of fair compensation with respect to claims within the Act for property taken or used by or for the Government of the United States itself.

So far as concerns claims falling within paragraph (4) of section 3(b) of

[18] Where the United States "was fully advised and possessed knowledge of plaintiff's patent" and its representative "was fully cognizant of the existence of plaintiff's rights" the giving of express or formal notice in the terms of the statute is unnecessary. Waite *v.* United States (May 2, 1927), 63 Court of Claims, at pages 454–455.

the Act dealing with the unlicensed use of patents by or for the United States, all claims are included which are based on patents which were acquired or seized by the Custodian and including all use occurring on or after August 1, 1914, and prior to the disposition of the patent by the Custodian, excluding only such use as occurred between the date of the declaration of war and the date of the Armistice, both dates inclusive.[19]

The Congress provided for the payment of fair compensation to former enemy patent-owners with full knowledge of the fact that they were for the most part without information as to the use made by or for the United States of their patented inventions and were, after the entrance of the United States into the war, prevented by the state of war from giving anything in the nature of an infringement notice even had they had knowledge of such use. It will be noted that the committees of Congress [20] pointed out that under paragraph (4) the ex-enemy patent-owner is entitled to compensation for use of the patented invention after seizure by the Custodian until the patent was disposed of by him. During this period the title to the patent was in the Custodian and the former owner was, for this additional reason, not in a position to give notice in the nature of an infringement notice to the United States or to a manufacturer for it. Yet there can be no doubt that notwithstanding the known absence of such notice the Congress intended fairly to compensate the ex-enemy patent-owner to the extent of the use made of the patented invention by or for the Government of the United States.

That the Congress did not intend to penalize the ex-enemy patent-owners for failure to give notice, which they were, during the war, unable to give and of something of which they had and could have no knowledge because of war conditions, is further evidenced by the provisions of paragraph (3) of section 3(b). As heretofore pointed out, the Congress was at pains to provide that the disadvantages and disabilities under which patent claimants labored at the time of the sale, license, or use of their patents or inventions should be disregarded and that, so far as determining fair compensation is concerned, the claimants should be clothed with all of the rights of American citizens, negotiating *de novo* for the sale or license to the United States or

[19] Administrative Decision No. I at page 23. [This JOURNAL, Jan. 1929, p. 212.]

[20] The Senate Committee in favorably reporting this measure February 9, 1928, had this to say (page 18):

" . . . Many of the patents were used prior to the seizure by the Alien Property Custodian. This class of patents is covered by paragraph (4) of subsection (b). If the patent was ultimately seized by the Alien Property Custodian compensation will be paid, for example, for all use, before or after seizure, excluding use between the declaration of war and the armistice, until the patent was disposed of by the Alien Property Custodian. If it was licensed, assigned, or sold to a private party no further compensation by the United States will be paid. If it was licensed, assigned, or sold to the United States, the compensation will be determined under paragraph (3)."

Substantially the same language was used in the report of the House Committee of December 15, 1927 (page 15).

the use by or for the United States of the patented invention *as of the time* of such sale, license, or use. The negotiation would have been that of a willing seller and a willing purchaser, and no question of the giving of notice as for an infringement could arise in determining the amount which would have been arrived at as the result of such bargaining.

If the giving of "sufficient notice to the public" or express notice to the United States as provided for by section 4900 of the Revised Statutes is read into paragraph (4) of the Act of 1928 as a condition to the United States making compensation for use of inventions by or for it, then this paragraph becomes meaningless and places the Congress in the position not only of making an idle gesture but convicts it of insincerity in providing for the payment of fair compensation for use of patented inventions on the condition that a notice had been given which it knew had not been and could not have been given. The Act bears no evidence of any such attitude on the part of the Congress. On the contrary, it reflects throughout a national policy of fair-dealing and a fixed intent and determination to treat the nationals of the former enemies of the United States justly and even generously.

It is the duty of the Arbiter to seek out and to give effect to the intent of the Congress. Should the Arbiter hold—which he does not—that the *letter* of the concluding sentence of paragraph (4) of the Act makes the giving of the statutory notice of section 4900 a condition precedent to recovery of fair compensation for use by or for the United States, such a condition would nevertheless be clearly repugnant to the whole spirit and purpose of the statute and therefore not within its terms. The reports of the Supreme Court of the United States abound with decisions supporting this rule, which is well stated in the case of Church of the Holy Trinity *v.* United States (1892), 143 U. S. 457, 459, in these words:

> . . . It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. . . .

The Arbiter holds that there are many defenses available to a defendant in an action for infringement which are available to the United States in claims pending before the Arbiter for the unlicensed use of patented inventions by or for the United States but that the failure to give the statutory notice as provided by section 4900 of the Revised Statutes is not one of them. A contrary holding would in most vital respects destroy paragraph (4) of the

Act and nullify the clear intention of the Congress to make compensation to ex-enemy patent-owners for the unlicensed use of their patented inventions by or for the United States itself.

APPLICATION OF DECISION

This decision in so far as applicable will control the preparation, presentation, and decision of all claims pending before the Arbiter falling within its scope. In the light of the principles and rules governing patent claims announced herein and in Administrative Decision No. I, the counsel for the claimants and for the Government of the United States will, through systematic coöperation, promptly develop all the pertinent facts with respect to each claim falling within the Arbiter's jurisdiction and, as far as practicable, stipulate such facts in each case. Where a controversy develops with respect to a particular issue the evidence of both parties will be submitted supported by briefs limited to that controversy. This practice will avoid the labor, expense, and delay incident to the filing of elaborate pleadings, motions, notices, and the like, which the Arbiter will not require. When the facts in any particular case are fully developed, if the counsel for the claimant and the counsel for the Government of the United States can through negotiation agree on the amount which would have resulted from fair negotiation between a willing seller and a willing buyer in accordance with the rules prescribed by this opinion, such agreement, with a brief statement of the reasons upon which it is based, will be submitted to the Arbiter with the case for his consideration in determining the amount, if any, to be awarded.

Done at Washington December 12, 1928.

EDWIN B. PARKER,
Arbiter.

ADMINISTRATIVE DECISION NO. III

CONSTRUING AND APPLYING THE TERM "MERCHANT VESSEL" AS USED IN THE ACT

March 9, 1929

Congress intended to make fair compensation to German nationals for all privately-owned merchant vessels taken by the United States under the joint resolution of May 12, 1917, but not paid for. Through the use of the limiting term "merchant vessel" it intended to exclude all vessels which, at the time of the taking, were German public ships, complete title to which vested immediately in the United States through the mere act of capture, independent of any Congressional resolution and without the necessity of adjudication by a prize court. In the absence of any authoritative definition of a vessel of war or of a merchant vessel which can properly be read into and as a part of the governing statute, the Arbiter's duty is limited to seeking out and declaring for what ships Congress intended to pay.

Prior to and during the World War the ships owned and operated by the principal navies of the world or in their possession and control were of two general classes, viz.: (1) fighting ships, including auxiliary cruisers (converted merchantmen), and (2) auxiliary vessels of all descriptions. All such were public ships. In addition, the navies frequently made use of merchant vessels privately-owned and operated which did not lose their status as merchant vessels while being privately operated for private profit under a naval charter. Such a vessel under naval charter by a belligerent was free to enter and depart from neutral ports.

Generally speaking, German merchant vessels were, according to German law or by agreement between the German Government and their owners, subject to use upon demand by the government in time of war. But their potentiality for use by the German Admiralty did not affect their status as merchant vessels. Even actual use by the German Admiralty did not change their status unless such use was of a nature to convert them from private to public ships, to impress them, for the time being at least, with the hostile characteristics of the warships to which they were attached. The fact of conversion can be readily determined, as it cannot be accomplished without a physical change in the equipment of the vessel. Such converted merchantmen are armed by the belligerent nation to carry on aggressive operations against the enemy and are formally incorporated in its navy.

Many of the German merchant vessels in American ports were subjected to acts of sabotage by their masters and crews under the direct instructions or on the request of the German Government. The evident purpose was to cripple the vessels and prevent their availability for prompt use by the United States if and when war was declared to exist between the United States and Germany. The observance of the instructions of the German Government by the masters and crews of these ships must be taken into account in determining the extent of the control of the German Government over them. But it is not apparent how these acts of sabotage *as such* can change the status of the ships or convert them from merchant vessels into hostile vessels of war. The ships were not *used* for any hostile purpose. In fact they were not used at all.

Congress drew the familiar distinction between vessels that were a part of the naval auxiliary fleet of Germany at the time they were taken by the United States and privately-owned merchant vesssels. Congress had no intention of making compensation for such public vessels; but the situation was entirely different with respect to those privately-owned German merchant vessels which, at the time of taking by the United States, were not a part of or attached to Germany's naval auxiliary fleet, and which had sought refuge in American ports during the period of American neutrality. Prior to April 6, 1917, they had the legal right to leave the United States ports unmolested. After that date, the United States had the legal right under international law to condemn these vessels in prize courts or to confiscate them through such procedure as the Congress might elect to adopt. In providing for the taking of possession and title to the ships the Congress was careful not to adopt confiscation of private property as a legislative policy of the United States. On the contrary, it is believed that it dealt with these German merchant vessels in accordance with the soundest and most advanced policies espoused by any nation in the field of international law.

The *Kronprinz Wilhelm*, *Prinz Eitel Friedrich*, *Locksun*, *Princess Alice*, *Holsatia*, *Coblenz*, and *Sambia*, considered.

PARKER, *Arbiter*, rendered the following decision:

In order to bring a ship claim of a German national within the jurisdiction of the Arbiter the claimant must allege and prove that the title to the vessel in question was taken by or on behalf of the United States under the authority of the joint resolution of the Congress of May 12, 1917, and that the ship was a "merchant vessel" at the time it was so taken.[1]

All of the vessels for the value of which claims are pending before the Arbiter were merchant vessels at the outbreak of the World War in July, 1914. The question dealt with herein as applied to each vessel is, Did this status subsequently change, and if so did such new status subsist at the time title was taken by or on behalf of the United States?

Much of the discussion in the books with respect to the indicia distinguishing a merchant vessel from a war vessel tends to obscure rather than to clarify the issue here presented. Even the reported decisions are frequently more confusing than helpful, because they turn on the varying language of

[1] The Settlement of War Claims Act of 1928, Section 3(b), provides—

"It shall be the duty of the Arbiter . . . to determine the fair compensation to be paid by the United States, in respect of—

"(1) Any merchant vessel (including any equipment, appurtenances, and property contained therein), title to which was taken by or on behalf of the United States under the authority of the Joint Resolution of May 12, 1917 (Fortieth Statutes, page 75). . . ."

the treaties or municipal statutes controlling the particular cases, essentially different both as to purpose and terms from the statute under which the Arbiter is acting.[2] In the absence of any authoritative definition of a vessel of war or of a merchant vessel which can properly be read into and as a part of the governing statute, attempts at generalization may prove as confusing as they are unnecessary.

The Arbiter's duty is limited to seeking out and declaring for what ships Congress intended to pay. Speaking generally, it is apparent that the Congress intended to make fair compensation to German nationals for all privately-owned merchant vessels taken by the United States under the joint resolution but not paid for. Through the use of the limiting term "merchant vessel" it intended to exclude all vessels which, at the time of the taking, were German public ships, complete title to which vested immediately in the United States through the mere act of capture, independent of any Congressional resolution and without the necessity of adjudication by a prize court.[3]

Prior to and during the World War the ships owned and operated by the principal navies of the world or in their possession and control were of two general classes, viz.: (1) fighting ships, including auxiliary cruisers (converted merchantmen), and (2) auxiliary vessels of all descriptions. All such were public ships. In addition to these public ships the navies frequently made use of merchant vessels privately-owned and operated which did not lose their status as merchant vessels while being privately operated for private profit under a naval charter.[4] Such a vessel under naval charter by a belligerent was free to enter and depart from neutral ports. While some nations had not subscribed to the Hague Convention No. XIII, it was, speaking generally, declaratory of international practices. The limitation of 24 hours in a neutral harbor which it contained was applicable to warships and had no application to such privately-owned vessels, at least so long as it did not participate in offensive naval operations as a tender to a warship

[2] From the numerous illustrations supporting this statement it will suffice to note that the British Prize Courts and the French Prize Council held that pleasure yachts were not merchant vessels within the meaning of the Sixth Hague Convention. The German Prize Court held that the term "merchant vessels" as used in the German Prize Code includes all vessels not owned by the state and hence would include a privately-owned seagoing pleasure yacht (Garner, Prize Law During the World War, sections 205 to 209, inclusive, also section 61 and authorities there cited).

[3] Article 99, Instructions for the Navy of the United States Governing Maritime Warfare, June 30, 1917; Cobbett, Leading Cases (4th ed.), Vol. II, page 275; Oppenheim, International Law (4th ed.), Vol. II, page 326; Hyde, International Law, Chiefly as Interpreted and Applied by the United States, Vol. II, page 818.

[4] United States Naval War College, International Law Situations, 1912, page 155; Decree of August 21, 1914, of French Government published in *Journal Officiel* No. 230; "Armed Merchant Ships" by A. Pearce Higgins in AMERICAN JOURNAL OF INTERNATIONAL LAW, 1914, Vol. 8, at page 712; Annual Report of the United States Navy Department for the fiscal year 1915, page 363; *The Attualita*, 238 Fed. 909.

or a fleet or otherwise in such a manner as for the time being to impress it with the hostile character of the ship or ships to which it was attached.

Speaking generally, German merchant vessels were, according to the German law or by agreement between the German Government and their owners, subject to use upon demand by the Government in time of war. But their potentiality for use by the German Admiralty did not affect their status as merchant vessels. Even actual use by the German Admiralty did not change their status unless such use was of a nature to convert them from private to public ships, or to impress them, for the time being at least, with the hostile characteristics of the warships to which they were attached.

The fact of "conversion" as that term is used in connection with an auxiliary cruiser can be readily determined. A merchant ship may be designed and constructed for ready conversion into a cruiser in the event of war. Such "converted merchantmen" are armed by the belligerent nation to carry on aggressive operations against the enemy and are formally incorporated in its navy. They become vessels of the naval auxiliary fleet, a part of the navy—public vessels. A conversion cannot be accomplished without a physical change in the equipment of the vessel. Under the terms of the Seventh Hague Convention, which though not subscribed to by the United States reflects the enlightened practice of nations, the converted ship in order to be entitled to the rights and immunities of a warship must be commanded by a commissioned officer of the fighting fleet, must be manned by a crew subject to military discipline, must bear the external marks distinguishing a warship of its nationality, must observe in its operations the laws and customs of war, and must be carried on the list of warships of the belligerent nation.

To this class of converted merchantmen belonged the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich*. Both of these vessels were by their construction designed for ready conversion and use as auxiliary cruisers. Following the declaration of war both were promptly armed and inducted into the German Navy as war vessels operated by naval commanders and crews—that is, they were promptly converted into auxiliary cruisers. In April, 1915, both of these vessels and their crews were interned in the port of Newport News. Prior to the time the United States took possession of them, the German Government, acting on behalf of their German owner, sought permission from the Government of the United States to reconvert them into merchant vessels, which permission was denied.[5] Claims for their value are before the Arbiter.

[5] As to the permanence of conversion for the duration of the war, see United States Naval War College, International Law Topics and Discussions, 1913, pages 148–154; opinion of Joint State and Navy Neutrality Board, Serial No. 111, dated October 5, 1915, filed with War Claims Arbiter as part of Exhibit A in Docket No. 794; Report of Henri Fromageot on Seventh Hague Convention, Reports to the Hague Conferences of 1899 and 1907, edited by James Brown Scott (Carnegie Endowment), pages 597–599; Proceedings of the Hague Peace Conferences, Conference of 1907 (Carnegie Endowment translation), Vol. III, pages 747, 811, 993, 999, and 1079.

The contention is put forward by the Government of the United States that some of the German merchant vessels which were not designed for conversion or which were not in fact converted into auxiliary cruisers nevertheless became impressed with the hostile character of the warships or fleet to which they were attached, so that, for the time being at least, they lost their status as merchant vessels. This contention is made in connection with the steamer *Locksun*, which while in the service of the German Admiralty under gross charter entered the port of Honolulu on October 15, 1914, and on November 8, 1914, was interned as a tender to and a part of the equipment of the German naval cruiser *Geier*. There was no change in the status of the *Locksun* from the date of her internment to the date possession of her was taken by the United States following the declaration of the existence of a state of war between the United States and Germany. The Government of the United States contends that the *Locksun* was not then a merchant vessel within the meaning of the Act.

The executive order of the President of the United States of May 22, 1917, singled out, grouped, and provided for the seizure of five ships, two of them, the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich*, then at the Philadelphia Navy Yard, one, the *Liebenfels*, then at the Charleston Navy Yard, and two, the *Geier* and the *Locksun*, then at the naval station at Honolulu. This grouping of five ships located in distant harbors is significant. The *Geier* was a gunboat owned and operated by Germany as a fighting ship. No claim for her value is before the Arbiter. Claims for the value of the remaining four ships are before the Arbiter.

The Naval Board of Survey, constituted in pursuance of section 2 of the joint resolution of May 12, 1917, to ascertain and make a written report of the value of the vessels taken by the United States in pursuance of that resolution, applied to the Secretary of the Navy for instructions with respect to appraising certain vessels. In response to that request they were, under date of February 9, 1918, instructed:

> The jurisdiction of the Board to Appraise Enemy Vessels, under the second section of the joint resolution of May 12, 1917, extends only to such as may be subject to claims for compensation.
>
> Naval vessels of the enemy, including armed merchant ships which have been taken over by the enemy navy as auxiliary cruisers, are subject to capture without compensation.

After referring to the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich*, the *Geier*, the *Locksun*, and the *Staatssekretär Solf*, the instruction concluded: "The Board will, therefore, not consider any of the five vessels mentioned in the reference as subject to survey and appraisal." The *Liebenfels* will be dealt with separately.

The remaining German vessels embraced in the list furnished the Naval Board were taken by the United States under the joint resolution, were treated by the Naval Board as merchant vessels, and were appraised as such

in their then condition, with proper deductions for damage done through acts of sabotage, for depreciation, and the like.

During the period of its neutrality the United States treated all of the vessels which were subsequently appraised by the Naval Board as merchant vessels. The owners or their representatives in charge of them paid harbor and tonnage dues and all port charges usually assessed against merchant vessels. From the records before the Arbiter it appears that some of them had during 1914 and 1915 been in the service of the German Admiralty under gross charters while being operated by masters and crews employed and paid by the owners. They were not armed, had no naval crews aboard, remained on the list of merchant vessels, had none of the physical characteristics of a fighting ship, and were without either the physical equipment or the legal right to engage in aggressive and hostile military operations. The Government of the United States had not hesitated to require the internment of the *Kronprinz Wilhelm*, the *Prinz Eitel Friedrich*, the *Geier*, and the *Locksun*, but took no measures for the internment of these other vessels. As indicating the view generally held by the authorities of the Government of the United States and their advisers with respect to such other vessels, reference is made to the editorial comment of Dr. James Brown Scott, then Editor-in-Chief of the AMERICAN JOURNAL OF INTERNATIONAL LAW (Vol. 9 (1915), page 486) and also senior member of the Joint State and Navy Neutrality Board upon whose advice the government dealt with the four interned vessels above enumerated. In the course of this editorial the statement is made:

> The vessels of the Hamburg American Line and the North German Lloyd Line, lying in the port of New York, are merchant vessels, not ships of war, and they are not to be considered as interned, as internment is applied solely to ships of war.

So far as disclosed by the records now before the Arbiter all of these vessels sought refuge as merchant vessels in American ports within a year after the outbreak of the World War and most of them during 1914. During all of this time and up to the declaration of the existence of a state of war between the United States and Germany on April 6, 1917, they were recognized by the United States as legally free ships. While they could not afford to venture out of the then neutral ports in which they had sought refuge, because to do so would result in their capture or destruction by the fleets of the then enemies of Germany, nevertheless there was no legal restraint on their leaving these ports and their private owners were, so far as the Government of the United States was concerned, at liberty to dispose of them at will.

But counsel for the United States contend that some of these vessels would have been interned and not treated as merchant ships free to come and go at will if their activities in serving under the orders of the German Admiralty and in connection with the German cruiser squadron prior to

their taking refuge in American ports had been known to the American authorities. The fact is they were not interned and at the time title and possession of them was taken by the United States their apparent status was that of free merchant ships. The facts necessary to determine the actual status of each must be examined.

Counsel for the Government of the United States suggest for the consideration of the Arbiter that acts of "sabotage" committed under instructions from or on the request of the German Government had the effect of converting the ships so damaged into hostile enemy property, and hence at the time they were taken by the United States they no longer had the status of merchant vessels.

On January 31, 1917, it became evident (through the delivery of the German note announcing the intention to resume unrestricted submarine warfare) that diplomatic relations between the United States and Germany would be broken off as soon as formal steps to that end could be taken, and immediately thereafter many of these ships were subjected to acts of sabotage by their masters and crews. In some instances the damage was considerable. On the record submitted and the admissions of claimants' counsel on the argument, the Arbiter finds that the acts were committed under the direct instructions or on the request of the German Government. The evident purpose was to cripple the vessels and prevent their availability for prompt use by the United States if and when war was declared to exist between the United States and Germany. The observance of the instructions of the German Government by the masters and crews of these ships must be taken into account in determining the extent of the control of the German Government over them. But it is not apparent how these acts of sabotage *as such* can change the status of the ships or convert them from merchant vessels into hostile vessels of war. The ships were not *used* for any hostile purpose. In fact they were not used at all. Rather they were damaged with a view to preventing their availability for prompt use. Had the ships been used by or under the direction of the German Government in any hostile operation against the United States or its nationals, a different question would be presented. But they were not operated. Instead they were operated *on* in an effort to prevent their early use for any purpose. While crippling them affected their value, it did not change their legal status. At the time these acts of sabotage were committed the legal relation of the United States to Germany was that of a neutral. The ships had sought refuge in neutral ports. They had the legal right to leave those ports at will. There was no *legal* obstacle to prevent those in charge of these vessels taking them out on to the high seas and there destroying them for the purpose of keeping them from falling into the hands of the United States or for any other purpose. The motive for such destruction would neither have affected the exercise of the legal right nor changed the character or status of the ship. The right to destroy necessarily included the right to cripple.

Counsel for the United States frankly call attention to the fact that the report of the Committee on Finance of the United States Senate having the measure in charge does not support their suggestion with respect to the effect of these acts of sabotage. In that report it is stated: [6]

> The rule of value prescribed also requires that the Arbiter make proper allowances for the condition of the ship at the time the United States took possession of it. Accordingly, all the damages as a result of acts of sabotage by the crews will be taken into consideration and the necessary deductions from the value of the ship made.

The Naval Board constituted under the joint resolution of May 12, 1917, had examined each ship and reported on the nature and extent of the acts of sabotage referred to by the Senate Committee. In the *Official Bulletin* of December 31, 1917, published daily under the order of the President of the United States, there appeared an official statement evidently compiled from data furnished by the Navy Department and the Shipping Board of the United States with respect to the damage done to these German ships and their repair by the Navy in record time, in which this language was used:

> There is evidence that a German central authority gave an order for destruction of these ships, effective on or about February 1, 1917, simultaneous with the date set for unrestricted submarine warfare and that the purpose was to inflict such vital damage to the machinery of all German ships in our ports that none could be operated for from 18 months to 2 years.
>
> This purpose has been defeated in signal fashion. In less than eight months all the ships were in service. . . .
>
> There is documentary proof that the enemy believed the damage irreparable.

There can be no doubt that the authorities of the Government of the United States as early as 1917 had evidence that these acts of sabotage were committed under instructions from or on the request of the German Government. In the light of this fact and the record before the Congress when this measure was under consideration, the report of the Senate committee strongly indicates an intention that these acts of sabotage should have no other effect than to reduce the value of the ships at the time they were taken. Had the Congress intended that acts of sabotage committed by orders of the German Government should deprive a vessel so damaged from participating in the compensation provided, a provision to that effect would have been incorporated in the Act. Instead of so doing the Act in effect provides—as pointed out by the committee—that the damage inflicted by these acts of sabotage should be taken into account by the Arbiter and proper deduction made therefor in fixing the value of the ships so damaged. It follows that the Arbiter must reject the suggestion that these

[6] Senate Report No. 273, February 9, 1928, 70th Congress, 1st Session (hereinafter referred to as "Senate Report"), page 6.

acts of sabotage had the effect of converting the ships so damaged into hostile enemy property and stripping them of the status of merchant ships at the time the United States took title and possession of them.

As already pointed out, the ships owned and operated by the United States Navy and those of other principal navies of the world are of two general classes, viz.: (1) fighting ships, including auxiliary cruisers (converted merchantmen), and (2) auxiliary vessels of all descriptions. All such are public ships. It will also be borne in mind that in addition to these public ships the navies frequently employ merchant vessels privately-owned and operated for the transportation of fuel or other supplies for the navy. Hundreds of such merchant vessels were so employed by the Allied and Associated Powers during the war.[7]

The Committee on Finance in reporting the measure to the Senate used this language:[8]

> In the first place the bill applies only to "merchant" ships. It is reported that at least four of the ships were naval ships, and these would be excluded. Furthermore, if any of the ships were used as naval ships, even though otherwise within the merchant class, no compensation would be paid for them.

The chairman of this committee in presenting the report to the Senate said:[9]

> It was suggested that a specific provision be inserted to the effect that no award should be made for any ship if it was part of the naval auxiliary fleet of Germany. This proposal was rejected because the provisions of the bill are adequate. Compensation will be paid only for "merchant" ships under the terms of the bill. . . . In any event, however, if it should develop that any of the merchant vessels were actually a part of the naval auxiliary fleet the provisions of the bill are adequate, for they would no longer be "merchant" ships.

It is evident that the Congress intended to draw and did in fact draw the familiar distinction between vessels that were a part of the naval auxiliary fleet of Germany at the time they were taken by the United States and privately-owned merchant vessels. There was no reason for making compensation for vessels belonging to the former class inasmuch as the capture by a belligerent of a public vessel belonging to the enemy vests immediate and complete title in the captor. The Congress had no intention of making compensation for such public vessels taken by the United States. This was the view expressed by the Secretary of the Navy in his instructions to the Naval Board of February 9, 1918, and the correctness of this rule was never challenged throughout the hearings and debates before the Congress extending over several years.

[7] See authorities cited in footnote 4 *supra*.

[8] Senate Report, page 6.

[9] Congressional Record (February 16, 1928), Vol. 69, page 3101, 70th Congress, 1st Session.

But the situation was entirely different with respect to those privately-owned German merchant vessels which, at the time of taking by the United States, were not a part of or attached to Germany's naval auxiliary fleet, and which had sought refuge in American ports during the period of American neutrality. They had the legal right so far as the United States was concerned to leave its ports unmolested at any time prior to April 6, 1917.[10] After that date, inasmuch as it was not a party to an express agreement to the contrary, the United States had the legal right under international law to condemn these vessels in prize courts [11] or to confiscate them through such procedure as the Congress might elect to adopt. The Congress elected to clothe the President with the power, which he exercised, to take title and possession of these vessels in pursuance of the joint resolution of May 12, 1917, but to await the termination of the war to decide finally what, if any, compensation it would make therefor and how such compensation, if any, should be determined.[12]

But in providing for the taking of possession and title to the ships the Congress was careful not to adopt confiscation of private property as a legislative policy of the United States. On the contrary, it is believed that it dealt with these German merchant vessels in accordance with the soundest and most advanced policies espoused by any nation in the field of international law. While the United States had not adhered to the Sixth Hague Convention, dealing with merchant ships engaged in commerce, belonging to nationals of one of the belligerent powers, found at the commencement of hostilities in an enemy port, nevertheless the declarations of its representatives and its whole course of conduct indicated that it was prepared to go even further than the terms of that convention in protecting merchant shipping engaged in international commerce. There is grave doubt as to whether the provisions of the Sixth Hague Convention were applicable even among its adherents to such vessels as the German port-of-refuge ships which had not engaged in commerce for almost three years prior to April 6, 1917.[13] But, construing the provisions of the Sixth Hague Convention most liberally for the protection of shipping engaged in international commerce, and applying not only the letter but the spirit of that convention

[10] For attitude of Department of State, see letter from Acting Secretary Polk to Senator Broussard dated May 18, 1916.

[11] As a matter of fact, when the Joint Resolution of May 12, 1917, was pending before the Senate an amendment providing for the condemnation of these vessels as prizes of war was offered and rejected.

[12] See statements of Representative Alexander, in charge of the resolution in the House of Representatives, Congressional Record, 65th Congress, 1st Session, pages 1904 and 1905; also letter from Attorney General Gregory to President Wilson dated August 6, 1917 (Department of Justice file 9–18 General), in which this statement occurs:

> "It is clear, from the history of the resolution, that both Houses of Congress intended to postpone until the conclusion of the war all judicial questions arising in the seizure of these ships."

[13] Garner, Prize Law During the World War, pages 284–288, and cases cited.

to the privately-owned German ships in American harbors on April 6, 1917, the United States would have been well within its rights under that convention in (a) detaining such vessels until the termination of the war and then restoring them to their owners without the payment of compensation for the period of detention or (b) requisitioning such vessels upon the payment of compensation. Either course would have been in accordance with the most liberal treatment of enemy merchantmen ever advocated by the responsible proponents of measures for the protection of merchant shipping engaged in international commerce. In effect, though not in form, the Congress has adopted the latter course through providing for the payment of fair compensation to the German owners of merchant vessels taken by the United States under the joint resolution of May 12, 1917.

The Congress has consistently declined to adopt as a legislative policy any measure for the confiscation of private property.[14] It has, on the other hand, consistently provided against compensating for enemy public property. Holding in mind this legislative policy, and the war history of the ships with which the Congress was called upon to deal, the Arbiter will apply the Act to the facts found to exist with respect to each ship, and determine whether or not the Congress intended to pay for that ship.

The counsel for the claimants and counsel for the Government of the United States have stipulated that the records are complete with respect to the "merchant" status or not of the following seven vessels: *Kronprinz Wilhelm, Prinz Eitel Friedrich, Locksun, Princess Alice, Holsatia, Coblenz,* and *Sambia.* A consideration and decision of these seven cases will serve as a guide for the preparation and submission of all other cases on this issue.

Docket No. 794—*Kronprinz Wilhelm*

From the record before the Arbiter it appears that the *Kronprinz Wilhelm* was built at Stettin in 1901 for the North German Lloyd and registered at Bremen. She was a twin-screw express passenger vessel of 14,908 gross registered tons and 6,900 deadweight tons, with an average speed of 23 knots; with steaming distance in sea miles by filling bunkers, 4,100, and by filling reserve bunkers and at ordinary speed, 4,800; with a capacity of 1,746 passengers; and she was designed and constructed for ready conversion from a merchant vessel to a naval ship.

At the outbreak of the war the *Kronprinz Wilhelm* was at the port of New York. On August 3, 1914, she sailed and on the 5th was ordered by wireless to meet the German cruiser *Karlsruhe* near the Bahama Islands. There she was fitted out as an auxiliary cruiser with guns from the *Karlsruhe.* She had a crew capacity of 527 men and was commanded by a German naval officer. On August 6, 1914, she was in a state of readiness to serve as an

[14] House Report No. 17, December 15, 1927, 70th Congress, 1st Session, page 6; Senate Report, page 17.

auxiliary cruiser of the German Navy and entered upon her career as such, although it was not until September 8, 1914, that there was entered on the ship's register at Bremen the following: "Cancelled. The ship is taken over by the Imperial Naval Forces."

During her cruising expedition against commerce, covering a period of some eight months, she captured and/or sank 13 vessels. She arrived off the Virginia Capes on April 10, 1915, and entered Newport News the following day. Her fuel was exhausted and her condition was bad. On April 12 application was made through the German Embassy to the American State Department for permission to remain at Newport News for more than 24 hours for necessary repairs. She was granted until midnight April 30, 1915, within which to complete her repairs and leave the territorial waters of the United States, or failing so to do to accept internment during the continuance of the wars in which Germany was then engaged. Not having left the port in accordance with these instructions, she was duly interned.

At the outbreak of the war the conversion of the *Kronprinz Wilhelm* from a merchant vessel, privately-owned and operated, into an auxiliary cruiser, a fighting ship of the German Navy, was promptly made. Such conversion consisted not only in the German Admiralty taking possession and control of the ship, but in the physical changes necessary to adapt the vessel which had been used in ordinary commercial trade to purposes of offensive warfare. "Conversion" as here used in a physical fact, not a mere mental process or the surrender of possession and control by the private owner to a government official.

To examine here the question of what constitutes reconversion and when and where reconversion may be effected would not be profitable. Obviously reconversion necessitates physical changes to readapt what had been a naval ship to the uses of ordinary commerce. Whether this must be accomplished in a port of the belligerent of which the owner is a national, or whether it may be accomplished on the high seas, are not questions which need be considered here. Suffice it to point out that reconversion may not, so long as the war lasts, take place in a neutral port after internment as a warship of a belligerent navy. If such reconversion were permissible internment would be little more than an idle ceremony.

In the latter part of 1915 authorities of the German Government in concurrence with the North German Lloyd applied to the authorities of the United States for permission to repair the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich* and to reconvert them from naval ships to merchant vessels "to enable both ships immediately to resume operations as merchant vessels upon the termination of their internment." It was urged that "internal improvements do not impair the ship's internment and, in the present case, it is all the more so as the proposed work will divest the steamers of the characteristics of a warship."[15]

[15] Letter of German Ambassador von Bernstorff to Secretary of State Lansing, November

Permission to make these reconversions was denied on the ground that "internment applies to vessels stamped with a naval character, and some question may arise as to the exercise of the right of interning the vessels in question and their officers and crews, if they were allowed to assume a merchant character."[16]

Possession of and title to the *Kronprinz Wilhelm* was taken by the United States evidenced by an executive order of the President dated May 22, 1917. Her status at that time was that of an auxiliary cruiser equipped for aggressive warfare and incorporated as a fighting unit of the German Navy. As such she had been interned on April 26, 1915, in the then neutral American port of Newport News. She remained an interned German warship until April 6, 1917, when the United States entered the war. Thereupon she became as to the United States an enemy warship and subject to capture without compensation. Complete title to her immediately vested in the United States with her seizure by it.

In these circumstances the Arbiter holds that the *Kronprinz Wilhelm* at the time possession and title to her was taken by the United States was not a merchant vessel within the meaning of the Act and the claim for her value does not fall within the jurisdiction of the Arbiter. The claim is dismissed.

Docket No. 795—*Prinz Eitel Friedrich*

The *Prinz Eitel Friedrich* was built at Stettin in 1904 for the North German Lloyd and registered at Bremen. She had a passenger capacity of 1,069 and a cargo capacity of 8,797 gross registered tons, with an average speed of 15 knots; steaming distance in sea miles by filling bunkers, 6,000, by filling reserve bunkers and at ordinary speed, 10,000.

At the outbreak of the war, August 1, 1914, the *Prinz Eitel Friedrich* was at Shanghai, China. Under orders from the German Admiralty she was promptly armed, using the equipment and crews of two German gunboats. On August 5 she was in readiness for service as an auxiliary cruiser with the German cruiser squadron and at once entered on that service. On November 4, 1914, there was entered on the ship's register the following: "Cancelled. The ship is taken over by the Imperial Naval Forces." In addition to acting as the leader of the collier train of the cruiser squadron she captured and/or sank several merchant ships. After these activities covering a period of seven months she entered the port of Newport News on March 10, 1915. On application she was allowed until midnight of April 7 to make the necessary repairs and leave the territorial waters of the United States, failing so to do to accept internment. She was interned as a belligerent warship at Newport News April 7, 1915.

11, 1915, Foreign Relations of the United States (hereinafter cited as "Foreign Relations"), 1915, Supplement, at page 839.

[16] Letter of Secretary of State Lansing to German Ambassador von Bernstorff, December 22, 1915, Foreign Relations, 1915, Supplement, page 843.

What has already been said with respect to the reconversion of the *Kronprinz Wilhelm* applies equally to the *Prinz Eitel Friedrich*, the possession of and title to which was evidenced by the executive order of the President of the United States of May 22, 1917. The two ships had the same status from the date they were respectively interned to April 6, 1917, and thereafter to the date of their taking by the United States.

In these circumstances the Arbiter holds that the *Prinz Eitel Friedrich* at the time possession of and title to her was taken by the United States was not a merchant vessel within the meaning of the Act and the claim for her value does not fall within the jurisdiction of the Arbiter. The claim is dismissed.

Docket No. 18—*Locksun*

The *Locksun* was a steel screw steamer of 1,657 registered gross tons, with an average speed of 10 knots, with a crew of 37, and a capacity of 1,125 passengers. She was built at Bremerhaven in 1902 and in 1906 was registered at Bremen by the North German Lloyd.

Early in August, 1914, the *Locksun*, with several other German merchant vessels under charter to the German Admiralty, was attached to the German cruiser *Geier* as a tender or collier. As such she continued active until damages to the boiler and machinery of the *Geier* requiring permanent repairs forced the latter to enter the port of Honolulu on October 15, 1914, followed closely by the *Locksun*. On application to the United States Government authorities the *Geier* was given three weeks within which to complete her repairs and leave American waters, failing in which to accept internment until the expiration of the war.[17] The *Geier* failed to comply with these requirements and on November 8, 1914, was interned.

For several weeks the *Locksun* had been accompanying and serving the *Geier* as a tender. The latter's crippled condition necessitated the *Locksun* extending unusual assistance to the *Geier*, at times towing her. The *Locksun* closely followed the *Geier* into the port of Honolulu on October 15. She was then under charter to the German Admiralty. So far as disclosed by the record before the Arbiter she was never released from that charter. At the time of entering the port of Honolulu with the *Geier* she was serving as the latter's tender. Acting Secretary of State Lansing on November 7, 1914, addressing the German Ambassador von Bernstorff, after referring to the activities of the *Locksun*, concluded his communication thus:[18]

> From these facts the Department is of the opinion that the operations of the *Locksun* constitute her a tender to the *Geier*, and that she may be reasonably so considered at the present time. This government is, therefore, under the necessity of according the *Locksun* the same

[17] Letter from Acting Secretary of State Lansing to German Ambassador von Bernstorff, October 30, 1914, Foreign Relations, 1914, Supplement, page 584.

[18] Foreign Relations, 1914, Supplement, 587.

> treatment as the *Geier*, and has taken steps to have the vessel interned at Honolulu if she does not leave immediately.

She did not so leave, and on the following day, November 8, 1914, both the *Geier* and the *Locksun* were interned as "German naval vessels."

On November 16, 1914, Mr. Lansing, in response to a communication from the German Ambassador inquiring the basis for the internment of the *Locksun*, referred to "the association and coöperation of the two vessels in belligerent operations" and added:[19]

> The *Locksun*, having been shown to have taken the part of a supply ship for the *Geier*, is, in the opinion of this government, stamped with the belligerent character of that vessel, and has really become a part of her equipment. In this situation it is difficult to understand on what basis it would have been possible to distinguish between the two vessels, so as to intern the one and not the other.

From November 8, 1914, to April 6, 1917, the *Locksun* in fact had the status of a "German naval vessel"[20] interned by the duly authorized executive officers of the then neutral Government of the United States in one of its ports. During all of that time she was, so far as appears from the record before the Arbiter, under charter to the German Admiralty. She was interned in the same port and at the same time and in connection with the German cruiser *Geier* and as part of the latter's equipment. Had she not in the opinion of the competent authorities of the Government of the United States at the time of entering the port of Honolulu been stamped with a naval character, she would not have been interned, for, in the opinion of such authorities, "internment applies to vessels stamped with a naval character."[21]

The Secretary of the Navy of the United States under date of February 9, 1918, instructed the Naval Board of Survey that the *Locksun* was a German naval vessel and as such subject to capture without compensation. She was one of the four vessels referred to in the report of the Senate Committee on Finance when it said:[22] "It is reported that at least four of the ships were naval ships, and these would be excluded."

The executive order of May 22, 1917, issued by the President, evidenced the taking by the United States of possession and title to five German vessels singled out and grouped therein, viz.: *Kronprinz Wilhelm*, *Prinz Eitel Friedrich*, *Liebenfels*, *Geier*, and *Locksun*. The *Liebenfels* will be dealt with separately. The *Geier* was admittedly a German war vessel. The Arbiter

[19] Foreign Relations, 1914, Supplement, 589.

[20] Foreign Relations, 1914, Supplement, page 588.

[21] Letter of Secretary of State Lansing to German Ambassador von Bernstorff, December 22, 1915, Foreign Relations, 1915, Supplement, page 843; also editorial of Dr. James Brown Scott, senior member of the Joint State and Navy Neutrality Board, *American Journal of International Law*, Vol. 9 (1915), page 486, where it is stated "internment is applied solely to ships of war."

[22] Senate Report, page 6.

has already held that the *Kronprinz Wilhelm* and the *Prinz Eitel Friedrich* were German war vessels at the time they were taken by the United States. At that time the *Locksun* had the status of an interned vessel which had been consistently treated as a German naval vessel since the date of her internment, November 8, 1914, by the competent executive officials (both State and Naval) of the United States. There is nothing in the history of the measures from time to time pending before the Congress, which finally culminated in the statute governing this arbitration, indicating that the Congress had any intention of reversing or in any way modifying the official action taken by the executive department of the government with respect to the *Locksun*. On the contrary, the Congressional records and reports all point the other way.

As the competent authorities of the Government of the United States had decided, on November 8, 1914, that the *Locksun*, then under charter to the German Admiralty as a tender to the German warship *Geier*, accompanying and coöperating with her in belligerent operations and in effect a part of her equipment, was stamped with the belligerent character of the *Geier* and hence a German naval vessel; as the *Locksun* was on that date interned as a German naval vessel; as her internment as such continued until the United States declared the existence of a state of war with Germany; as on the record before the Arbiter all of the competent authorities of the Government of the United States continued to treat the *Locksun* as a German naval vessel from the date of her internment to the date the United States took possession of and title to her; as thereafter the Naval Board of Survey, acting under instructions of the Secretary of the Navy, treated the *Locksun* as a naval vessel subject to capture without compensation; and as the records of the Congress indicate that it was not its intention to reverse or modify the position of the competent officials of the executive department with respect to the status of the *Locksun;* the Arbiter holds that it was not the intention of the Congress to include the *Locksun* among the German merchant vessels taken under the authority of the joint resolution of May 12, 1917, and for which compensation was provided by the Act of 1928. The claim is dismissed.

Docket No. 26—*Princess Alice*

The *Princess Alice* was a twin-screw steamer of 10,981 registered gross tons, with an average speed of 15½ knots, with a crew of 218 and a capacity of 2,429 passengers, built at Stettin in 1900 for the North German Lloyd, and registered at Bremen in 1904.

From the record before the Arbiter it appears that the *Princess Alice* at the outbreak of the World War was in the Pacific, and in response to orders from the German cruiser squadron carried provisions, equipment, and reservists to the German cruiser *Emden* in the vicinity of Palau Islands. About August 17, 1914, the *Princess Alice*, Captain Bortfeldt in command,

with provisions and engine supplies and about 60 reservists for the cruiser squadron, headed for Yap and from there was ordered to Angaur. En route she met the *Emden* and supplied that cruiser with provisions and equipment.

In his post-war report the commander of the *Emden* states:

> In respect of the utilization of the *Princess Alice* as auxiliary cruiser, I was told by Captain Bortfeldt that this steamer was, in his opinion, not very fit, because the boilers were in very bad condition and besides the steamer had bunker coals only for four days.
>
> I, therefore, resolved to take along the *Princess Alice* until meeting the SMS *Geier* and then to escort this valuable mail steamer to close vicinity of an American port in the Philippine Islands.

The commander of the *Emden* further states that he took over a part of the crew and supplies from the *Princess Alice* for the *Emden;* that he handed over to the *Princess Alice* mail and a telegram to a cipher-address of the naval staff reporting that the *Emden* had received orders to carry on cruiser warfare in the Indian Ocean, and also some orders for the Marine Commission.

On August 19 the *Emden* left Angaur followed by the *Markomannia* and the *Princess Alice* and met the cruiser *Geier* which was coming from Offak, Island of Waygiou. During the night the *Princess Alice* lost connection with the *Emden.* The commander of the *Emden* first planned a new meeting-point, but later decided to abandon the original intention to convert the *Princess Alice* into an auxiliary cruiser because of the condition of her boilers and her scant coal supply.

On August 20, 1914, the commander of the *Emden* gave to the *Princess Alice* by wireless telegraph a discharge from further service and an order to proceed on her own responsibility to a neutral port. The *Princess Alice* arrived at Cebu, Philippine Islands, on August 26, 1914. Here she remained until possession of and title to her was taken by the United States on June 30, 1917. She was never converted into an auxiliary cruiser. She was used by the German Admiralty for a portion of the month of August, 1914, for carrying supplies, provisions, and reservists to the cruiser squadron. These services were such as any merchant vessel flying the German flag would have been required to provide under similar circumstances, and such as any neutral merchant vessel might have been chartered to perform without affecting her status as a merchant vessel. The *Princess Alice,* far from being a helper, a tender, a part of the equipment of the *Emden* (as the competent officials of the Government of the United States found the *Locksun* to be to the *Geier*), was found by the *Emden* to be a handicap in that the latter felt responsibility for protecting this valuable mail steamer against possible capture by an enemy warship. Moreover, the *Princess Alice* had been released from charter by the German Admiralty six days prior to her taking refuge in the port of Cebu, which she entered alone as a German merchant vessel privately-owned and operated, wholly unattached to any German vessel of war. She was unarmed, had no naval crew aboard, remained on

the list of German merchant vessels, had none of the physical characteristics of a fighting ship, and was without either the physical equipment or the legal right to engage in aggressive and hostile military operations.

On this record the Arbiter holds that the services rendered by the *Princess Alice* to the German cruiser squadron in the early days of August, 1914, did not operate to convert her from a merchant vessel into a naval vessel, or for a period of nearly three years following her discharge from charter by the German Admiralty to impress her with the hostile character of the German cruiser squadron. It follows that the *Princess Alice* was a merchant vessel within the meaning of the Act when the United States on June 30, 1917, took possession of and title to her, and is one of the vessels for which the Arbiter is empowered to determine fair compensation under the Act.

Docket No. 72—*Holsatia*

The *Holsatia* was a steel steamer of 5,649 registered gross tons, with an average speed of 11 knots, with a crew of 47, built at Dumbarton, Scotland, in 1914, registered at Hamburg as the property of the Hamburg-Amerika Line.

At the outbreak of the war the *Holsatia* was unloading cargo in the port of Shanghai. On August 1, 1914, by an order given through the medium of the Hamburg-Amerika Line, the unloading of cargo was stopped and the vessel began to take on coal to capacity. By August 3 some 5,000 tons of coal and other supplies had been loaded and at 6:30 p. m. the *Holsatia* left under orders to join the German cruiser squadron, which was effected about August 11. From that date until the vessel arrived at Honolulu on October 12, 1914, she was required to sail in obedience to orders issued by the commanders of the German cruisers in the Pacific. According to the report of the captain of the *Holsatia*, on October 2 he went to the commander of the staff and discussed with him the dismissal of the *Holsatia* from the service of the squadron. He suggested that he be permitted to proceed either to San Francisco or to South America in order to return to the squadron with new coal supplies. This suggestion the commander of the staff declined, and on that date gave an official dismissal to the *Holsatia* from the service of the cruiser squadron reading as follows:

South Sea, *October 2, 1914.*

B. Nr. 4504.

SS *Holsatia* herewith receives order to proceed to Honolulu. Upon her arrival there she is dismissed from the service for the cruiser squadron and proceeds at her own discretion or upon instructions of her owners.

For the support given so far the cruiser squadron I express my thanks and my recognition to the vessel and to her master.

A map of the Sandwich Islands and also an extract of the book with sailing instructions is attached hereto.

Count Spee.

The *Holsatia* took refuge at Honolulu on October 12, 1914, on which date her commander made the following entry in the "journal notes" kept by him during the voyage from Shanghai to Honolulu: "According to command of the squadron the *Holsatia* is dismissed on this day from the service of the cruiser squadron."

This terminated the entire service rendered by the *Holsatia* to the German Navy. There is evidence in the record that on several occasions after the *Holsatia* reached Honolulu the German naval authorities considered the possibility of employing her in the transportation of supplies, but these plans, whatever they may have been, were never carried into effect. After the *Holsatia* reached Honolulu she took on board some coal from the *Locksun*. The United States naval authorities forbade her to leave the port with this coal because the *Locksun* had been interned. This order was obviously designed to prevent the avoidance by the *Locksun* of the consequences of internment, and did not affect the status of the *Holsatia*.

The services rendered by the *Holsatia* to the German cruiser squadron consisted in loading and carrying 5,000 tons of coal and other supplies from Shanghai and discharging such cargo to members of the cruiser squadron as opportunity offered and necessity required, covering a period of some two months. The exigencies of warfare did not permit the discharge of the cargo at a supply base and the commander of the cruiser squadron retained the ship under naval charter until its cargo was discharged and she had found refuge in the port of Honolulu, whereupon she was discharged from further service to the German Admiralty. This service rendered by the *Holsatia* was a transportation service such as might have been required of any German merchant vessel or might have been performed by any neutral merchant vessel under charter to the German Admiralty.

On the record before the Arbiter, and for the reasons mentioned in the case of the *Princess Alice*, the Arbiter holds that the *Holsatia* was a merchant vessel within the meaning of the Act at the time possession of and title to her was taken by the United States and that the claim for her value is within the jurisdiction of the Arbiter.

DOCKET NO. 9—*Coblenz*

The *Coblenz* was a twin-screw steamer of 3,130 registered gross tons, with an average speed of 11 knots, with a crew capacity of 54 and a capacity of 126 passengers, built at Hamburg in 1897, registered in Bremen in 1897 as the property of the North German Lloyd.

The *Coblenz*, en route from Sydney, Australia, to Yap, reached Yap on August 9, 1914, and there first learned of the existence of a state of war. She was immediately requisitioned by the German Navy and sent to Truk for the purpose of bringing to Yap the men, munitions, and equipment of the German survey boat stationed at Truk. She returned to Yap with the crew of the survey boat on August 19 and was immediately released from further

service with the German Navy with orders to continue to Manila, where she took refuge on August 25 and where she remained until possession of and title to her was taken by the United States on June 30, 1917.

On December 22, 1914, the *Coblenz* was requisitioned by the Imperial German Consul at Manila as an hotel ship for German refugees, and was so used.

For the reasons indicated in the cases of the *Princess Alice* and the *Holsatia*, the Arbiter holds that on the record submitted the *Coblenz* entered the port of Manila on August 25, 1914, as a merchant ship and that her status remained unchanged from that time to June 30, 1917, when the United States took possession of and title to her under the joint resolution of May 12, 1917, and that the claim for her value is within the jurisdiction of the Arbiter.

Docket No. 90—*Sambia*

The *Sambia* was a cargo steamer of 4,765 registered gross tons, with an average speed of 10.5 knots, with a crew of 50, built at Flensburg in 1899, registered at Hamburg in 1899 by Flensburger Schiffsbau Gesellschaft, and registered in 1900 as the property of the Hamburg-Amerika Line.

From the record it appears that the *Sambia* on July 25, 1914, was taking cargo in Saigon (French Indo-China). The ship was chartered with a full cargo of rice from Saigon to Europe. On account of a general order of the Hamburg-Amerika Line to start for a neutral port in the event of war, the *Sambia* left Saigon on August 4, 1914, with clearance to Manila, at which port she arrived on August 8, 1914.

On January 18, 1915, an agency of the Hamburg-Amerika Line, acting in accordance with an augmentation agreement between that company and the German Government, arranged to use the *Sambia* for storing coal for the German Government. From January 20 to 27, 1915, the *Sambia* received 4,925 tons of German Government coal from the American steamer *Robert Dollar*, which was held on the *Sambia* until August, 1915, when it was sold to the United States Navy. The *Sambia* sailed on August 18, 1915, for Cavite, where it unloaded and delivered the coal to the United States Navy, with the exception of about 600 tons which was refused on account of fire damage. The *Sambia* returned to Manila on September 7, 1915, and after distributing among several German vessels lying at Manila 500 tons of coal retained the remaining 100 tons for her own use. She continued to lay at Manila until possession of and title to her was taken by the United States under an executive order of June 30, 1917.

This was the extent of the service rendered by the *Sambia* to the German Government during the war, for which her owner, the Hamburg-Amerika Line, received from the German Government as compensation 101,673 marks. The *Sambia* was at all times in the possession and under the control of the Hamburg-Amerika Line, in charge of its master and crew. She was,

under contract with the German Government, used for hire by her owner for storage of coal for the German Government. No change was made in her equipment or crew. Her cargo space was merely utilized for the storage of property belonging to the German Government, most of which was subsequently sold and delivered to the Government of the United States. This fact did not operate to deprive her of her status as a merchant vessel within the meaning of the Act. The Arbiter finds that when possession of and title to the *Sambia* was taken by the United States she was a German merchant vessel within the meaning of the Act and that the claim for her value is within the Arbiter's jurisdiction.

In the light of this decision and its application to the seven cases specifically dealt with, the facts with respect to the status of each vessel involved in this arbitration will be fully developed and stipulated by counsel, or in the event of controversy determined by the Arbiter, who will, on such stipulations or findings, decide whether or not the particular vessel was a merchant vessel within the meaning of the Act at the time it was taken by the United States.

Done at Washington March 9, 1929.

EDWIN B. PARKER,
Arbiter.

CLAIM FOR THE STEAMSHIP "LIEBENFELS"

(Docket No. 36)

March 9, 1929

The Arbiter finds that the *Liebenfels* was sunk in Charleston harbor by her master and crew in such a manner as to constitute an obstruction to navigation; that the competent authorities, in pursuance of the statutes enacted under the Constitution of the United States, after full investigation and consideration determined and declared the vessel abandoned by her owner and took possession of and promptly proceeded to remove her; that she was in fact so abandoned; that henceforth she was treated by the authorities of the executive departments of the Government as the property of the United States; that, claiming title had already vested in the United States, there was no intention to take title to the *Liebenfels* under the joint resolution of May 12, 1917; and that the records of the Congress indicate that these facts were well known to it and that it had no intention to reverse or modify the position of the competent officials of the executive branch of the government with respect to the status of the *Liebenfels*. Held that the *Liebenfels* was not among the German merchant vessels for which compensation was provided by the Act of 1928.

PARKER, *Arbiter*, rendered the following decision:

Invoking the provisions of the Settlement of War Claims Act of 1928, the claimant herein seeks an award against the United States for a sum equivalent to the fair value of the Steamship *Liebenfels*.

Counsel for the Government of the United States contend that this ship was not a merchant vessel title to which was taken by or on behalf of the United States under the authority of the joint resolution of May 12, 1917, so as to bring it within the jurisdiction of the Arbiter.

For the reasons here set down the Arbiter sustains the contention of the Government.

From the record it appears that the *Liebenfels* was a cargo mail steamer of 4,525 gross tons, 67 in crew, of 10 to 12 knots speed, 390 feet length, 50.8 feet beam, 25.6 feet draft when loaded, built in 1903, and registered at Bremen by the Hansa Line June 26, 1903.

On July 16, 1914, the *Liebenfels* left the port of Nordenham, Germany, for Charleston, South Carolina, and Wilmington, North Carolina, with a cargo of 5,604 tons of kainit salt. On August 4, 1914, she arrived at Charleston where she discharged her entire cargo and where, due to the outbreak of the World War, she remained as a German refugee ship in a neutral port. She was commanded by one Captain Klattenhoff. Most of her crew were Lascars and were returned to India under the supervision of the immigration authorities. The captain and a few members of the crew, most of whom were officers, remained with the ship, which was anchored in the Cooper River, a part of the Charleston harbor, until they sank her at her anchorage on the night of January 31–February 1, 1917. On that night and simultaneously with the acts of "sabotage" committed by the crews on many German vessels in American territorial waters (dealt with in Administrative Decision No. III handed down this day), the crew of the *Liebenfels*, acting under the instructions of the captain, seriously damaged her engines, wireless apparatus, and navigation instruments and opened her seacocks and bilge valves, permitting the water to enter the hold. The levers were so bent as to render them useless for closing the seacocks and bilge valves in time to prevent the sinking.

The captain and all members of the crew, save First Officer Lübken and a negro cook, left the vessel that night and took with them their personal belongings. The ship's papers were carried away or destroyed. In the early morning of February 1 the masters of two tugboats noticed the plight of the *Liebenfels*, pulled alongside, and called First Officer Lübken's attention to the fact that several of the portholes and a bunker door were open, through which water would soon enter and seriously endanger the vessel. They suggested to Lübken that these be closed and that the vessel be either pumped out or beached to prevent her from being submerged and obstructing the channel. The first officer curtly refused assistance to that end and gave as a reason that the captain was not on board and he could not act without the captain's orders. The vessel continued to settle slowly until about midday of February 1 when it came to rest on the bottom of the Cooper River in some 36 feet of water where she lay approximately diagonally across and in the middle of the channel. She was directly in the path of all craft, including ships of war, bound to or from the inner harbor on which was located a navy yard of the United States. On the same day the Collector of the Port boarded and inspected the vessel. The first officer, who was then still on board, declined to give any information with respect to the circumstances of

the sinking. At nightfall an inspection disclosed that no lights had been placed on the wreck as required by section 15 of the River and Harbor Act of March 3, 1899.

The following day a board was convened consisting of the Commandant of the Navy Yard at Charleston, the Collector of the Port, the United States District Attorney and certain assistants, the local Immigration Inspector and other officers of the immigration service, and the local District Engineer. They reported "the vessel was abandoned, that is to say there was absolutely no one aboard." The physical conditions were found and reported as recited herein. An officer and sailors from the navy yard were placed on board the vessel temporarily as a guard under direction of a deputy customs collector. Thenceforth the vessel was continuously under guard of representatives of the Government of the United States.

The owner of the *Liebenfels* had a superintendent in New York with authority to act for it in the United States. Neither this superintendent nor the master of the vessel or the crew took any steps to protect her as required by the navigation laws of the United States or to recover the ship. On the afternoon of February 2 the master and the first officer stated that they had neither communicated with the owner or its agents nor taken steps to protect or to raise the vessel.

Notwithstanding the failure of the master to communicate with the owner's superintendent in New York, the latter through the evening newspapers of February 1 which he had read had notice of the wrecking of the ship. The New York and other papers of February 2, 3, and 4 carried news stories, some of which were illustrated, of the sinking of the *Liebenfels*, with the statement that she was believed to have been "scuttled" by her own crew and sunk in violation of the navigation laws of the United States. It is apparent that this superintendent knew during the first days of February what the public generally knew with respect to the sinking of the *Liebenfels*. Nevertheless he did not raise his voice to disavow the act of the ship's master and crew in wrecking her machinery and equipment and so sinking her as to obstruct navigation generally and to interfere particularly with warships entering or departing from the navy yard.

In these circumstances the War Department of the United States, in the performance of its duties as prescribed by statute,[1] took prompt action to remove this obstruction to navigation. The Congress, in pursuance of the power to regulate navigation conferred upon it by the Constitution of the United States, had in turn delegated to the Secretary of War the right to determine what constitutes a menace or obstruction to navigation.[2] The decision of the Secretary of War in the exercise of this power had the same force and effect as direct action by the Congress.

[1] Sections 15, 19, and 20 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1121, at 1152–1155).

[2] Loud *v.* United States, 286 Fed, at page 59, and authorities there cited.

The Secretary of War determined that the ship was an obstruction to navigation and had been abandoned and ordered it to be removed. Acting under the orders of the Secretary of War dated February 10, the District Engineer on February 19 entered upon the actual work of removing the wreck and completed it on March 14. While this work was being prosecuted vigorously, the New York superintendent of the owner filed a petition with the Secretary of War on February 23 in which he demanded the custody of the vessel. This petition was referred to Judge Advocate General Crowder, who, after reviewing the evidence submitted, found that the *Liebenfels* was sunk "with an evil and unlawful intent" and that there "was a voluntary relinquishment of possession not only with the intention of relinquishing the rights of ownership in the vessel as such, but with the further intention to subject her to a use unlawful in itself and to the injury of the government under whose protection she was, and which, under the evident purpose of those who sank her, continually subjected her to complete destruction." General Crowder concluded that under the provisions of sections 15 and 19 of the River and Harbor Act, the pertinent provisions of which are copied in the margin,[3] the War Department "may raise the vessel and, after the vessel has been raised, may sell her and cover the proceeds of the sale into the Treasury." This opinion was formally approved on March 2, 1917, by Newton D. Baker, Secretary of War, who directed the Chief of Engineers to proceed in accordance therewith. This constituted an official determination and declaration by the Secretary of War of abandonment within the period of 30 days after the sinking. The *Liebenfels* was formally delivered to the Navy Department of the United States pursuant to an order issued on April 21, 1917, by the Secretary of War. On May 4 the Navy Department receipted for the vessel as of March 20.

That the German consul stationed at Atlanta instructed the captain of the

[3] "SEC. 15. . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

"SEC. 19. That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: . . . *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States."

Leibenfels to damage her engines and machinery is established by abundant evidence found in the record. The claimant denies that the German consul instructed the captain to sink the ship. It is apparent that the captain, the first officer, and the crew intended not only to sink her but to do so in such a manner as to obstruct navigation. This is indicated by the fact that on the morning of February 1 the first officer refused the proffered assistance of two tugs either to pump out the vessel or to beach her on the edge of the channel where she would not obstruct navigation and where the necessity of raising her would be avoided. The captain stated positively that he received orders to sink the ship which he was forced to obey. The only orders disclosed by the record came from the German consul. His recent affidavit is far from satisfactory. Carefully refraining from categorically denying that he gave an order to sink the ship, he indulges in a labored argument against the plausibility of such a charge, pointing out that no other ships in his district were sunk and that his orders from the German Government, transmitted through the German Embassy, directed that the ships be not *destroyed* but merely damaged. The *Liebenfels* was not destroyed. She was the only German ship lying in a channel communicating with a navy yard of the United States, the obstruction of which channel would not only interfere with ordinary navigation but with the passage of vessels of war to and from the navy yard. The captain of the *Liebenfels* acted on urgent written instructions from the German consul secretly delivered to him on the afternoon of January 31, 1917, the date on which it became evident (through the delivery of the German note announcing the intention to resume unrestricted submarine warfare) that diplomatic relations between the United States and Germany would be broken off as soon as formal steps to that end could be taken. The captain stated that after reading these instructions carefully he immediately destroyed them and at once took measures to carry them into effect. The Arbiter does not doubt that the captain acted in good faith in executing what he believed to be instructions from the German Government communicated to him through the German consul. On the following day the German consul, in response to telegraphic instructions received from the German Embassy, secretly left his post at Atlanta on a mission to Ecuador, where there was no provision allowing extradition for the offense of conspiring to violate the navigation laws of the United States with which he was subsequently charged.

Shortly after the sinking the captain and members of the crew were indicted and convicted in a Federal Court for sinking the ship in a navigable channel in violation of the statutes of the United States. The German consul, the ship captain, and a naturalized American citizen of Charleston, who acted as a messenger between the first two, were also indicted for conspiring to violate those statutes. As the German consul had been transferred by the German Government to Ecuador, where this offense was not extraditable, he was never brought to trial. The captain and the

naturalized American citizen were tried and convicted on this charge of conspiracy.

While the record is far from satisfactory on this point, the Arbiter finds that in communicating instructions to the captain of the *Liebenfels* the German consul was acting in pursuance of instructions from duly authorized officials of the German Government. Weighing the evidence as a whole, the Arbiter finds that the captain and the crew of the *Liebenfels* in damaging and sinking her were acting in pursuance of the instructions of the German consul.

On the record considered in Administrative Decision No. III, handed down this day, the Arbiter found that acts of "sabotage" to which many of the German ships in American ports were subjected on or immediately after January 31, 1917, when it became evident that the breaking-off of diplomatic relations between the United States and Germany was imminent, were committed under the direct instructions or on the request of the German Government. In the cases there dealt with the ships were not *used* for any hostile purpose. In fact they were not used at all. Rather they were damaged with a view to preventing their availability for early use. They are clearly distinguishable from the case of the *Liebenfels*. Wrecking in whole or in part the machinery of the *Liebenfels* was not an offense against the United States nor did it operate to deprive the ship of her status as a merchant vessel. But the situation is quite different when on the instructions or request of the German Government the ship was so used as to obstruct the only available channel leading to a navy yard of the United States with which the German Government expected soon to be at war. It may well be that this constituted a taking-over of the ship by the German Government and using her for a belligerent purpose, which action would, for the time being at least, strip her of her status of a merchant vessel. But the Arbiter does not rest the decision on this ground but rests it on the ground that title to the *Liebenfels* was not taken by or on behalf of the United States under the authority of the joint resolution of May 12, 1917.

Counsel for the claimant insist that the hull of the *Liebenfels* after she was sunk did not constitute an obstruction to navigation, that she was never abandoned by her owners, and that title to her was in fact taken by the United States under and by virtue of executive orders signed by the President and issued in pursuance of the joint resolution of May 12, 1917.

The Secretary of War expressly and formally declared the *Liebenfels* to be an obstruction to navigation in her sunken position—diagonally across and in the middle of the channel which constituted the sole approach to the inner harbor and the navy yard. This action was taken after full investigation and under authority conferred upon him by the Congress under the Constitution. There is nothing in the record indicating that in so holding the Secretary of War acted either arbitrarily or in abuse of the discretion conferred upon him by the Congress. In these circumstances the Arbiter would

hesitate to inquire into the correctness of this ruling of the Secretary of War.[4]

But apart from such holding, and on the record submitted, the Arbiter finds that the hull of the *Liebenfels* was an obstruction to navigation. There is testimony in the record to the effect that the ordinary vessel or even a warship could be skillfully maneuvered so as to pass on either side of the *Liebenfels*, but this did not prevent the sunken hull from seriously obstructing free ingress to and egress from the inner harbor and the navy yard through the only channel by which they could be reached. The Arbiter rejects the contention of claimant's counsel that the *Liebenfels* constituted no greater obstruction to navigation resting on the bottom than when she was at anchor in approximately the same location. When afloat she could be readily moved and when at anchor she had on board a crew whose duty it was to maintain proper lights and other signals and station lookouts as required by the rules and regulations governing the harbor. At the bottom of the channel and abandoned by her crew she was a lifeless and unguarded hazard which every ship seeking to enter or leave the harbor had to discover and avoid at its peril.

Counsel now seek to repudiate the acts of the captain and crew in sinking the *Liebenfels*, contending that the captain was guilty of barratry and that his acts are not binding on the owner. This repudiation would have come with better grace and carried with it greater force had it been made by the owner's authorized agent in New York immediately following the general broadcasting through the daily press in New York and elsewhere of the essential facts connected with the sinking. Dr. Mueller, then German consul at Atlanta, bears witness to the publicity given this event, of which he states he read in an Atlanta newspaper on February 1, by an entry which he claims to have made in his diary immediately thereafter, in which he refers to this sinking as an "event which had caused so much excitement and which was beaten out in all newspapers." It will be borne in mind that on the same night that the *Liebenfels* was damaged and sunk numerous other German vessels in American harbors were damaged on the request or instructions of the German Government. This fact was doubtless known to the claimant's superintendent in New York—a German national—who hesitated to take any action which might run counter to the instructions and wishes of the German Government. This inaction on the superintendent's part was not broken until about February 23 when his petition was filed with the Secretary of War on behalf of the owner demanding the custody of the *Liebenfels*. Manifestly the Secretary of War would have been derelict in the discharge of the duties imposed upon him by the Congress had he waited for 23 days for the owner to act in removing an obstruction to navigation caused by the wilful act of the master and crew. On the contrary, the Secretary of War took prompt and efficient action. After a full investigation the District Engineer

[4] Loud *v.* United States, 286 Fed. at page 59, and authorities there cited.

was directed by an order dated February 10, 1917, to remove the obstruction to navigation in accordance with the provisions of section 19 of the River and Harbor Act. The removal operations were actually begun on February 19 and completed on March 14, 1917. Judge Advocate General Crowder, after reviewing the facts pertaining to the sinking of the *Liebenfels*, held:

> Her master and crew sank her, having in view not only the immediate purpose of obstructing the navigable capacity of the waters of the United States as highways of commerce, but of obstructing the full use of such waters by the nation for its own defense and protection; and, having sunk her, they then deserted and abandoned her. . . .
>
> That there was an abandonment is not open to question.

This finding was approved by the Secretary of War, who determined and declared the abandonment of the vessel under that portion of section 19 of the River and Harbor Act which provided that when—

> such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same.

Counsel for the claimant insist that the finding of the Secretary of War that the ship had been abandoned was unauthorized by the statute under which he acted and not binding on the owner or on the Arbiter.

Section 15 of the statute expressly imposed upon the owner of the sunken craft the duty "to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for." Section 19, dealing generally with such removal, provided that when "such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel . . . shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same." Counsel for the claimant urge that there can be no abandonment short of 30 days after the creation of the obstruction unless the fact of abandonment is "legally established in a less space of time" and that the term "legally established" as used in the statute means established through a decree of a competent court.

In the enactment of the statute the Congress obviously intended to clothe the Secretary of War with broad powers coupled with the duty promptly to act in the public interest in protecting channels of navigation and keeping them free from obstruction. The construction contended for by claimant would not seem to be in harmony with this intention. Abandonment could not as a rule be judicially determined in a less period than 30 days. It is

made the duty of the owner of a sunken craft immediately to undertake its removal under penalty of a presumption of abandonment being raised against him. Abandonment is a fact, and a provision authorizing the Secretary of War after full investigation and consideration formally to declare the abandonment of the vessel, rather than to sit helplessly by and wait for 30 days to elapse, would seem to be a reasonable one. The Secretary of War pursued the first course.

On February 23 there was a belated protest in the form of a petition to the War Department by the New York superintendent as agent of the owner demanding the custody of the vessel. But neither then nor since has the owner had recourse to the courts seeking to have reviewed or set aside this formal finding of abandonment by the Secretary of War. That finding is now for the first time challenged by the owner before a judicial tribunal. It is unnecessary here to determine whether or not that finding is binding on the Arbiter, for on the record submitted the Arbiter finds as a fact that the ship was abandoned by the owner. This being true, the title to the sunken vessel vested in the United States upon its taking possession of her.

From the date of the formal determination and declaration of abandonment by the Secretary of War every department of the Government of the United States that has dealt with the status of the *Liebenfels*—the War Department, the State Department, and the Navy Department—has consistently maintained that possession and title to this ship was taken by the United States through the Secretary of War acting under the provisions of the River and Harbor Act.[5]

On May 28, 1917, the Navy Department addressed a letter to the Naval Board of Survey, constituted pursuant to section 2 of the joint resolution of May 12, 1917, which purported to list the names of German ships seized by the United States upon the declaration of the existence of a state of war and the ports at which the vessels were seized. This communication made no mention of the seizure of the *Liebenfels* but concluded with the statement that—

> The *Liebenfels*, which was sunk at Charleston before war was declared, was raised by the Army and thereby coming under the control of the War Department was transferred to the Navy Department.

On December 31, 1917, the Naval Board of Survey in a communication to the Secretary of the Navy referred to the letter of May 28, and requested that—

> Information be obtained from the Army as to whether all the legal requirements were complied with which would result in the loss of

[5] See memorandum dated September 27, 1917, to the Secretary of State from the Minister of Switzerland transmitting a note verbale from the German Government on behalf of the owner of the *Liebenfels*, and the reply of the Secretary of State dated November 20, 1917, to the Minister of Switzerland to the effect that the United States Government was proceeding in the *Liebenfels* case under the River and Harbor Act of 1899.

> ownership by the previous owners of the *Liebenfels* due to the abandonment of a vessel in navigable waters.

Upon reference of this request to the Secretary of War that official communicated to the Secretary of the Navy—

> the circumstances surrounding the sinking which are regarded by this Department as constituting legal abandonment of the vessel as contemplated by Section 15 of the River and Harbor Act of March 3, 1899.

The Navy Department in turn advised the Naval Board of Survey that—

> it appears therefore that the *Liebenfels* was the property of the United States at the outbreak of war, and does not come within Senate Joint Resolution No. 42, approved May 12, 1917.

Acting in accordance with this advice, the Naval Board made no appraisal of the *Liebenfels*.

But counsel for the claimant contend that the executive order of May 22, 1917, signed by the President, authorizing the Secretary of the Navy to take over to the United States "the immediate possession and title" to the *Liebenfels* along with the *Kronprinz Wilhelm*, the *Prinz Eitel Friedrich*, the *Locksun*, and the *Geier*,—five vessels in all—was an admission by the Government of the United States that it did not already have title to the *Liebenfels* and that this executive order was issued and title to the *Liebenfels* was taken by the United States pursuant to the joint resolution of May 12, 1917.

A consideration of the status of each of these five vessels mentioned in this executive order is illuminating. The *Geier* was admittedly a German war vessel, for which no claim is or could be here asserted. The status of the *Kronprinz Wilhelm*, the *Prinz Eitel Friedrich*, and the *Locksun* was considered at length in Administrative Decision No. III and the claims for their value were dismissed on the ground that they—in common with the *Geier*—were German public ships "complete title to which vested immediately in the United States through the mere act of capture, independent of any Congressional resolution and without the necessity of adjudication by a prize court." This disposes of all five of the vessels mentioned save the *Liebenfels*, which had been in the possession of the Navy Department of the United States for more than a month at the time the executive order was issued purporting to authorize the Secretary of the Navy to take immediate possession and title to her. As already pointed out, the departments of the government had up to that time consistently contended and continued thereafter consistently to contend "that the *Liebenfels* was the property of the United States at the outbreak of war, and does not come within Senate Joint Resolution No. 42, approved May 12, 1917."

The order of May 22 did not in terms purport to have been issued pursuant to that joint resolution. It singled out and separately dealt with five ships —two of them then at the Philadelphia Navy Yard, two at Honolulu, and the fifth in Charleston harbor—to all of which the competent executive authori-

ties of the Government of the United States already claimed title. This grouping of five ships located in distant harbors is significant. The Arbiter concludes that the order of May 22, 1917, was designed to perfect the record with respect to the title to these ships which such authorities claimed had already vested in the United States, and that title to the *Liebenfels* was not taken under this order or pursuant to the joint resolution.

Finally, counsel for the claimant contend that the so-called "blanket" executive order of November 24, 1919, issued pursuant to the joint resolution of May 12, 1917, while not mentioning the *Liebenfels*, was broad enough to include and in fact did include her. The terms and effect of this order were considered by the Arbiter in his decision of December 3, 1928, dealing with claims for ships seized in Cuban ports.[6] For the reasons there stated the Arbiter holds that this "blanket" executive order was not intended to embrace and in fact did not embrace the *Liebenfels*.

To sum up, the Arbiter finds that on February 1, 1917, the *Liebenfels* was sunk in Charleston harbor by her master and crew in such a manner as to constitute an obstruction to navigation; that the competent authorities, in pursuance of the statutes enacted under the Constitution of the United States, after full investigation and consideration determined and declared the *Liebenfels* abandoned by her owner and took possession of and promptly proceeded to remove her; that she was in fact so abandoned; that thenceforth she was treated by the authorities of the executive departments of the government as the property of the United States; that, claiming title had already vested in the United States, there was no intention to take title to the *Liebenfels* under the joint resolution of May 12, 1917; and that the records of the Congress indicate that these facts were well known to it and that it had no intention to reverse or modify the position of the competent officials of the executive branch of the government with respect to the status of the *Liebenfels*. The Arbiter holds that it was not the intention of the Congress to include the *Liebenfels* among the German merchant vessels title to which was taken by or on behalf of the United States under the authority of the joint resolution of May 12, 1917, and for which compensation was provided by the Act of 1928.

The claim is dismissed.

Done at Washington March 9, 1929.

EDWIN B. PARKER,
Arbiter.

[6] Pages 75–82, Decisions and Opinions.

BOOK REVIEWS *

Francisco de Vitoria, Fundador del Derecho Internacional Moderno. By Camilo Barcia Trelles. Madrid: Reus, 1928. pp. 229. 8 pesetas. (University of Valladolid, publications of the section of American studies.)

Interest in Vitoria, as one of the important figures in the beginnings of international law, has grown rapidly in recent years, and this volume by Dr. Barcia Trelles fills a distinct want. In a brief introductory chapter, the life of Vitoria is sketched, with enough of the background of fifteenth-century Spain to permit of a general understanding of the conditions under which he labored. Likewise a comparison is made of Grotius and Vitoria, the differences of environment being offered to explain and justify the wide discrepancy between their theories and points of view. While Grotius knew from close contact with the horrors of war in western Europe a good deal of the actual considerations that prevailed as between sovereign states, Vitoria, on the other hand, was dominated in his thought by the extension of Spain's domains in the New World. War, for Vitoria, was largely a process of subduing pagan Indians. About Vitoria's various reactions to early Spanish colonial policy, this book revolves.

The body of Dr. Barcia Trelles' book is taken up with a careful analysis of the theories expounded by Vitoria as a lecturer in the University of Salamanca, with special stress on the present day applications of those theories as relating to sundry international problems. The drawing of comparisons and analogies is sometimes a trifle artificial, and perhaps fails of its point in marking the universality of Vitoria's teachings. Three groupings conveniently divide this part of the book: (1) the problem of the extension of sovereignty, (2) the fundamental rights of states, and (3) law and war.

The volume includes a brief bibliography, but the lack of an index and the scantiness of documentation decrease the value of the book for reference purposes.

WILLIAM H. HESSLER.

Der Neutrale Charakter von Schiff und Ladung im Prisenrecht. By Sidney H. Brown. Zurich: Orell Füssli, 1926. pp. 310.

The author of this book made his researches in the field of prize law under the direction of Professor W. Burckhardt, delegate of Switzerland to the League of Nations. The book is an attempt to view the problems of the neutral character of ship and cargo from the angle of non-maritime nations like Switzerland, which have, nevertheless, a great stake in the sea-borne commerce of the world. Dr. Brown believes that it has now become more

* The JOURNAL assumes no responsibility for the views expressed in book reviews or notes.—ED.

important than ever to seek for greater clarity and permanence in the rules of neutral commerce at sea, in view of the Treaty of Versailles and the Barcelona Convention of 1921 which guarantee the right of ships owned by subjects of nations having no seacoast to fly the national flag. The author draws attention to the two conflicting determinants of enemy character, domicile and nationality, respectively, and gives illustrations of the contrary decisions of prize courts in the first two years of the late war. The rights of Swiss firms having a commercial domicile in enemy countries were dependent upon whether the capture was made, for example, by a British or by an Italian ship. In the one case the cargo would be declared prize, while in the other it would be acquitted, thus negativing the existence of a prize law claiming to be international in scope. Later, the two theories tended in part to merge, by operation of trading-with-the-enemy statutes, but certainly not to the advantage or relief of neutral commerce. The extension of enemy character to enemy firms domiciled in neutral countries was first energetically combatted on legal grounds by the United States, only to be adopted by our own practice following upon the Trading With The Enemy (Amendment) Act of 1917 and our intervention as a belligerent (p. 94). With the end of the war and the repeal of war legislation, the old rules have apparently revived, but from the viewpoint of a perpetually neutral state, the situation remains much as it was during the war.

The author proceeds to examine the classic rules of blockade and contraband in the light of the practice of the maritime belligerents. He believes that long-distance blockades have come to stay. He takes a realistic view of things and does not agree with those who predict that "the flow of belligerent pretension" will subside in due course, "leaving the islands of recognized neutral commerce, blockade and contraband, standing as before." Thus did the late George Grenville Phillimore sum up the prophecies of this school of thought. Our author is in error in identifying him with it. Mr. Phillimore had no such illusions, for in the very address from which the author quotes, Phillimore insisted that "alike for belligerents as for neutrals, return to the *status quo ante* is as impossible in the juridical relations of nations as in their political relations" (Grotius Society, IV, p. 69, cited by Brown, p. 303). The difference between Brown and Phillimore is simply that Brown advocates a complete abolition of the right to seize contraband, a proposal made by Lord Reay at the Second Hague Conference, while Phillimore believed that this has become impracticable and therefore he preferred to visualize progress through a revision of the Declaration of London.

Nations of weaker sea power, "non-maritime" as the author calls them, will some day give new thought to the possibility of protecting neutral commerce at sea from the destructive forces of comprehensive contraband lists, blacklisting and other inroads upon their right to survive in time of war. The author has not relied much for consolation upon the new attitude toward war generally, nor upon the new instrumentalities of world organization.

But when the laws of naval warfare are re-stated, the suggestions contained in Dr. Brown's monograph will be found worthy of careful consideration.

ARTHUR K. KUHN.

L'odierno impero britannico, sua configurazione constituzionale ed internazionale. By Giambattista Mazzoleni. Pavia: Libr. Flli. Treves dell' A. L. I., 1928. pp. 142. Index. L. 18.

Le "status" des dominions britanniques en droit constitutionnel et en droit international. By Edmond-Edouard Buchet. Paris: Recueil Sirey, 1928. pp. vi, 139.

The unusual political organization known as the British Empire, escaping many of the fixed categories and classifications of a state system known to the classical political scientists, has naturally, since the war, invited study by scholars in nearly every country. The two books under review exemplify such study. Dr. Mazzoleni's work, published as a University of Pavia "Studi" (No. 36), is descriptive of the British Empire and its constituent parts, mainly from a constitutional point of view. After examining the internal arrangements in each of the dominions and in the mother country, in 1914, he examines their relations *inter se* and the methods of centralized control. During the war, there developed the Committee of Imperial Defense and the Imperial General Staff. The author estimates the effect of war centralization on post-war decentralization and examines the results of the several imperial conferences. A special chapter is devoted to India and Ireland. While the League of Nations may have served to emphasize the growing autonomy of each Dominion, the author believes that the bond of imperial union is very strong and is likely to remain so indefinitely.

Dr. Buchet's study, while tracing the constitutional development of the Dominions in legal theory and in actual practice, the differentiation of which he points out, devotes major attention to the acquisition by the Dominions of what the author calls their international "status," their degree of international statehood, through the Treaty of Versailles and the Covenant of the League, the several articles of which are analyzed. The Treaty recognizes the unity of the Empire, and the Covenant, the independence of the Dominions. Perhaps this indicates that the Covenant was not considered a serious obstacle to imperial unity. At all events, the author regards the independence of the Dominions internationally as limited to the deliberations of the League of Nations, although he regards as significant the treaty relations of Canada with the United States, and the representation by legation or otherwise of several of the Dominions at Washington and in international conferences, such as that of Washington (1921). The issues raised by the refusal of Canada to sign the Treaty of Lausanne (1923) lead to the conclusion that, while Canada is bound by the British Foreign Minister's signature and Great Britain's ratification, she entered a *caveat* against the assumption of responsibility to enforce the treaty. Similar issues arose in connection

with the London Conference of 1924 on the Dawes Plan, in disarmament conferences, and elsewhere, the Dominions insisting upon asserting autonomy, the Empire compromising. The author examines the constitutional changes wrought by the imperial conferences of 1921, 1923, and 1926, in which the Empire agreed to make no major international commitments without consulting the Dominions. The author concludes that the Empire is still in process of evolution, but is more inclined to believe that diplomatic representation of the Dominions in London is likely, rather than federalism.

E. M. B.

Europe: A History of Ten Years. By Raymond Leslie Buell. New York: Macmillan and Co., 1928. pp. xiv, 428. Index. $2.50.

Doctor Raymond Leslie Buell's book, entitled "Europe: A History of Ten Years," somewhat inevitably suggests comparison with Mr. Frank H. Simond's brilliant study of the same period, published in 1927. The aim of both authors has been to tell a consecutive story of international events covering the ten years that have elapsed since the signing of the Treaty of Versailles. But while Mr. Simonds has addressed his appreciations to the general public, Doctor Buell has had in mind the graver necessities of students more directly interested in actual problems of foreign policy. In both works a valuable task has been accomplished in furnishing a guide to the bewildering maze of historical sources concerning the aftermath of the World War, which lie buried in the files of the daily press.

Doctor Buell's book is frankly a collaboration based on the work of the Research Staff of the Foreign Policy Association. The numerous and increasing audience who have adopted the prandial approach to the study of our foreign affairs sponsored by this association are furnished with monthly "background" bulletins respecting current topics. Much of this material deserves to be preserved in a more permanent form, a task which Doctor Buell, as editor, has accomplished in the present work. Written in an entertaining, if somewhat breathless style, an extraordinary amount of information regarding the international affairs of present-day Europe has been condensed into a brief space. This material has, on the whole, been carefully sifted, yet now and again such careless statements as that contained on page 291 to the effect that "Rumania cast in her lot with the Central Powers fighting against Russia" makes for somewhat startling reading. On the other hand, the section devoted to the Dawes plan offers a succinct and acceptable treatment of an involved and highly technical subject. A series of portraits of the statesmen who directed the fortunes of the warring powers adds color and interest to the narrative. In the case of M. Poincaré, "The Saviour of his Country more times than he can remember," and Mr. Ramsay McDonald, whose brief but fruitful appearance on the European stage Doctor Buell does not fail to eulogize—these characterizations are especially successful.

W. P. Cresson.

American Diplomacy in the Modern World. By Arthur Bullard. Philadelphia: University of Pennsylvania Press, 1928. pp. 127. $1.50.

Within the brief compass of 125 pages Mr. Bullard discusses, in three chapters, America and the New Diplomacy, America and the Organization of Peace, and America and the Problem of Disarmament. In opening the discussion of disarmament, reference is made to two prevailing and divergent points of view, aptly illustrated: "Americans believe that if Cain had not had a club, he would not have killed Abel. Europeans believe that if Abel had had a club, he would not have been killed." Obviously this is not quite fair to either side, but the distinction of viewpoints is clearly presented. The author clearly perceives the real problem as the limitation and reduction of armaments and points out that complete disarmament would be more advantageous to industrialized nations, which could readily transform peace time industries into munitions factories, than to industrially backward countries. The thesis of the chapter is "Armaments are only the symptom. The disease is fear" (p. 97) and this fear is closely bound up with the term "security." The Geneva Protocol of 1924 attempts to cure the disease by providing for the peaceful settlement of international disputes and the assurance of security with the thought that the third step naturally would be disarmament. The progress which has been made in the direction of disarmament is reviewed, stressing the Washington Conference, the Locarno Pacts, and the Coolidge Conference at Geneva, with a discussion of the nature and extent of the success of each. This entire chapter gives an excellent background for an understanding of the problems confronting the Geneva meeting of the League of Nations Preparatory Commission in 1929. In discussing the organization of peace Mr. Bullard declares his conviction "that our national interests would be forwarded by membership in the League." He then outlines the points of view of three important groups of American citizens "who stand in the way of any effective coöperation with other nations in the effort to organize peace, who obstruct any joint endeavor to extend the realm of law among the nations" (p. 79). The most obvious, if least important of these, is described as "war hawks" who feel that law may be good for other people but is not needed by us. A second group is described in the slang phrase, "Let George do it." "The preservation of peace is just as vital for others as for us. Let them organize a League of Nations. Its every success is to our benefit. If they are willing to do it, why should we accept any obligations or risks? Let us profit wherever we may from the efforts of others. It is cheaper to let them defend our interest in the preservation of peace than to do it ourselves." The largest and most difficult obstacle is presented by the third group of indifferent folk who are content to let things stand as they are. Mr. Bullard feels that "we must honestly make up our minds what we mean by the word 'peace' and decide whether we really want it. If we do, we must be prepared to pay the price" (p. 88). This volume affords an admirable summary of

the problems of peace and may be read with profit by any one interested therein.

W. LEON GODSHALL.

1918–28—A Short History of the World. By C. Delisle Burns. New York: Payson & Clarke, Ltd., 1928. pp. xx, 473. Appendices and Index. $3.50.

This is a useful book in which to review the history of the last ten years. Its chapters are grouped under three divisions—Transition to Peace, The New System at Work, and New Issues—which are a key to the mass of historical material that is brought together by the diligent author. His comments on men, events and policies have the pertinency, the truthfulness and the humor that are characteristic of a college professor in speaking in an intimate way in his classroom, but his class in this case is supposed to be the common man for whom, rather than for the college man, this book is intended, though it is expanded from a series of university lectures.

The author takes up the armistice, the peace conference, the changes that were made in the constitutions or the control of Russia, Germany, Austria, Italy and the acceptance of new states that came into the family of nations as the result of the War. He describes the new Russian system under Sovietism, the struggle for supremacy between the forces of radicalism and conservatism in Europe, the effort to reinsure by the Locarno treaties the vague military security pledged by the League of Nations, the economic restoration of European countries that were disastrously affected by the War, the period of return to normalcy under President Harding in America, and the operation of the League of Nations through administrative agencies and the Permanent Court of International Justice. Under new issues he deals with the changes that have come about in Turkey, India, China, and South Africa. His last chapter, which is entitled "The Next Act," is interpretative of the tendency of present-day forces. Economic issues are no longer confined to Europe, which has become provincial by the War, but are world-wide. Nations that once were concerned with the capture of foreign markets, however, are replacing their imperialism with schemes for internal social betterment. Far-off countries like India are building up local industries for home consumption at the expense of the mother country. Communism reached the height of its power when the chaos of war ended and the period of stabilization began. It is now receding before a great wave of democracy with its own equalization of opportunities. The old selfish diplomacy is being superseded by the coöperative spirit of the League of Nations which offers to small states a forum in which to be heard and a certain amount of protection from the domination of the Great Powers whose word used to be law.

These readable chapters in contemporary history are followed by appendices containing lists of important treaties, biographies, bibliographies, maps and graphs which make this work available as a handbook.

JAMES L. TRYON.

The Development of International Law. By Sir Geoffrey Butler, K.B.E., M.A., and Simon Maccoby, M.A. London, New York and Toronto: Longmans, Green & Co., 1928. pp. xxxvi, 566. Index. $9.00.

This book, the preparation of which was undertaken before the war, was originally intended to take the place left still unoccupied by Wheaton's book, now out of print, and Dr. Walker's admirable history, the first volume of which, 1899, was unhappily not followed by a second.

Of the need of a new book on this subject there can be no question. Much material had been accumulated and new organization of it was highly desirable. Any sincere and competent effort to meet the existing need, therefore, deserves approbation, and this attempt to meet the requirement, measured by industry and scope, is both sincere and competent.

Sir Geoffrey, who writes the preface, ascribes much of the book to the researches of his former pupil, Mr. Maccoby, but holds himself chiefly responsible for its final form.

He well observes that their main problem was one of method. For this there are obvious reasons. The development of international law ranges over a long period of time and includes a vast variety of topics. To organize all the subject-matter upon any organic principle involves many practical and some theoretical difficulties.

Among these latter is the difficulty of a clear statement of precisely what international law, in its essence, really is; or of the point of view that it is nothing truly real or natural, as distinguished from being merely arbitrarily conventional. To phrase the difficulty differently, Has international law any real basis in human nature, which by a process of natural and logically consistent evolution can make it anything more than a series of arbitrary determinations of power?

In changing the conception of the work, as Sir Geoffrey records, from a "*History*" to "The *Development* of International Law," one would reasonably suppose that there must have been in the mind of the writers some clear conception of just what is being developed.

If there was such a clear conception, the present reviewer has failed to discover it.

What we have before us is a great volume of detail, usually based on documents but not devoid of personal opinions regarding meaning and values, arranged sometimes in a topical and sometimes in a chronological order, the two seldom marching with an even pace.

The general divisions betray this uneven gait: Part I, The Age of the Prince; Part II, The Age of the Judge; Part III, The Age of the Concert.

From the text one sees that the Prince stands for absolute personal sovereignty, the Judge for the British Prize Court, and the Concert for congresses, conferences, treaties, and finally The League of Nations.

The book, thanks to the index, is valuable for reference and is substantially accurate on questions of fact. What one misses, through no fault of the

authors perhaps, is ground for assurance that there is real progress toward the international application of accepted principles of human justice. This, of course, cannot be exacted of History, but it might well be expected of Development. Until there is a more distinct conception of what international law really is, as a department of Jurisprudence and not the plaything of Politics, its development promises to be very much a continuation of what it has been—an effort to secure a *modus vivendi* by the equilibrium of power.

The realization of a law-governed world appears to be still remote, but the ground for it has been already laid in the multilateral treaty known as the Paris Pact. It is the first and widest general appeal to the rule of pure jurisprudence as a substitute for the rule of force. It is a long step in advance of the League of Nations, which is a military and political alliance based on the supremacy of the force of all the members as opposed to the force of one or a few. The step forward recommended by the League's Commission for the formation of the Court, that there should be a progressive revision and clarification of international law, was rejected by the League as untimely and dangerous. The refusal of the Greater Powers after the formation of the Court to accept the jurisdiction of the Court in all justiciable cases, that is cases which must be determined by law, renders an appeal to the Court by a weak Power illusory. And thus the further development of international law in a positive sense as a protection against injustice is in effect arrested by a waning but not yet expired spirit of imperialism.

DAVID JAYNE HILL.

L'Indemnité de Guerre en Droit International. By Luce Camuzet. Paris: A. Pedone, 1928. pp. vi, 218. Fr. 40.

In the wars of the future, who should pay reparations and indemnities, and to what extent? This study by Luce Camuzet is addressed to these problems. *"Pas de paix sans responsabilité ni sanction"* is the author's general thesis. In order to attain permanent peace, it is advocated that a definite and positive rule of responsibility for causing and for illegally carrying on wars be made a part of international law. In case of war the nation at fault, *i.e.*, the aggressor, should be internationally responsible irrespective of the outcome of the war. International responsibility is used here in the sense of a liability to make pecuniary reparation to the injured nation. At the same time, international rules governing the measure of reparation and indemnity, in case of war, should be definitely established.

In the limited space of this book, it was impossible for Mr. Camuzet to give more than general consideration to the problems necessarily raised in connection with his subject matter, among them being a study of the theories underlying international responsibility, a consideration of methods for the determination of what constitutes aggression, and a study of damages, direct, indirect and penal, properly assessable against the aggressor nation. Much consideration is given to the economic and reparation provisions of the Treaty

of Versailles, in the light of historical and judicial precedents, and of French interests. The desirability of greatly increasing the use of judicial machinery in the settlement of international disputes is emphasized, and the progressive codification of international law is commended. The author advocates the extension of the advantages of the latter movement to the development of laws governing the responsibility for wars.

In considering the question of war damages in international practice (p. 153), the author's indication that "indirect damages" are being awarded by the German-American Mixed Claims Commission is hardly correct, as will be seen by a reference to Administrative Decision No. II and to the Opinion of the Commission in the War Risk Insurance Premium Claims (pp. 11 and 33 respectively, of the Decisions and Opinions of the Commission, Government Printing Office, 1925). Also it may be a bit misleading for continental writers to refer to the German-American Claims Commission as the "*Tribunal Arbitral Mixte Germano Americain*" (p. 161). The German-American Mixed Claims Commission was established pursuant to the Agreement of August 10, 1922, between the Governments of the United States and Germany, and its jurisdiction includes matters to a certain extent similar to those coming before the Clearing Offices, the Mixed Arbitral Tribunals, and the Reparations Commission established under the provisions of the Treaties of Peace.

The book is useful for its collection of precedents bearing on the particular problem involved, and for its analysis of these precedents in the light of that problem. It contains a good bibliography but unfortunately lacks an index and a table of citations.

E. Russell Lutz.

The War Debts. By Philip Dexter and John H. Sedgwick. New York: Macmillan Co., 1928. pp. viii, pp. 173.

The purpose of this book is to summarize the political arguments on cancellation of inter-allied war debts. It begins with a brief analysis of the relationships between the old world and the new in the century and a half before the war and concludes that during this period both England and France displayed a superior attitude toward the United States such as is typical of senior political entities when dealing with their juniors. The World War forcefully turned the tables since allied victory depended upon the support of the United States and because we became the financial temple before which both England and France had to kneel. This new condition was tacitly accepted by our present debtors in the heat and enthusiasm of the war, but when the days of settlement arrived they returned to their pre-war way of thinking. This, the authors believe, is in part the cause for some of the ingenious arguments which have been advanced by such writers as M. Tardieu and Mr. Snowden—arguments pleading the coöperative nature of the allied cause and hence urging moderation and friendship in settlement.

Denying the coöperative nature of the war and insisting that we fought only for the protection of our own rights (which Germany happened to violate more than England), the writers maintain that we are justified in demanding settlement in full. However, they briefly consider the probable results, political, psychological, and economic, of such debt payments, and conclude that cancellation will be the best for all concerned. Appendices contain certain important documents pertaining to the debts, such as our peace treaty with Germany and the agreement of settlement with England. The entire book should prove of value as a convenient summary of this important question.

WALTER H. C. LAVES.

International Economic Relations. By John Donaldson. New York: Longmans, Green & Co., 1928. pp. xxx, 674. Index. $3.20.

At a time when the economic interrelation of nations is so much stressed as it is today, there is great need for treatises which combine and correlate instead of isolate the economic and other factors in international relations. Dr. Donaldson attempts in this book just such a correlation and hopes to contribute to the general subject by this picture of the "politico-economic structure."

Part I of the treatise outlines the "basic and related factors in national and world economy." There appears to be nothing novel in the method of presentation, and its content covers the general fields of commercial geography and international relations. It is in Part II that the author aims to make his chief contribution under the title, "The Structure of National and World Economy." A mass of detail is included which tends to obscure the theme of this section of the book, although the chapters dealing with the control of raw material and world resources are by themselves interesting summaries of important world problems.

It is doubtful whether the author has been wholly successful in his ambitious effort to present a "delineation of structure of national and world economy." The chief difficulty which must have faced him is the detailed presentation, in one volume, of a very complex subject. To deal with it theoretically as a problem would have been relatively simple, but the inclusion of a vast amount of elementary and historical data opens the way to losing track of the main theme. Dr. Donaldson attempts by the use of sectional topic-headings to keep the subject before the reader, but even this does not seem to clarify the arrangement. The treatise was not to be an encyclopedic work and hence it is in many respects elementary; yet it was to be comprehensive and because of the detail has in many places lost the broad vision which it aims to present.

The general reader will find much of interest and may profit by the great amount of factual material. For elementary college work where the course offered is the only one in international relations and international commer-

cial policies there may be some use for it. As for the advanced student, for whom the work is planned (p. xxi), there is every reason to believe that with the proper guidance he will learn more on the basis of individual and extensive reading than by placing into his hands any kind of a textbook, least of all one of this type which includes so much elementary material. Where the library facilities are limited, or where the instructor cannot or does not furnish the necessary inspiration a textbook of this nature may be necessary. Under these circumstances as well as where the course is conducted primarily on the basis of lectures, Dr. Donaldson's book will be a guide for the instructor and the student. But even here it is debatable whether a shorter treatise outlining the interrelations of economic with other factors, accompanied by comprehensive references, would not be more satisfactory in many ways.

WALTER H. C. LAVES.

Grønlands Statsretslige Stilling i Middelalderen. By Jón Dúason. Oslo: Nikolai Olsens Botrykkeri, 1928. pp. 216.

This is a doctor's dissertation on the legal position of Greenland in the middle ages. It proves that an understanding of the juridical elements is vital to a comprehension of the subject. In order to get at the facts of the juridical situation Dúason goes to some length into valuable historical matter. From the Graagaasen, Járnsíóa, and Jónsbók as well as from other old documents a social, political, and legal picture is drawn of Greenland of the middle ages. Several books have already been written on the history of Iceland and Greenland, but this one takes an entirely new point of departure and for that reason seems to be somewhat revolutionary. It is an interpretation of facts drawn from sources which oftentimes are necessary to print in part verbatim. Happily the clarity, conciseness, and organization have nowhere suffered. The book is authentic and at the same time relatively easy to read.

THORSTEN KALIJARVI.

Origins of the World War. By Sidney Bradshaw Fay. New York: Macmillan Co., 1928. 2 vols. pp. xxii, 551; xiv, 577. Index. $9.00.

An appreciation of what may be called the intrinsic value of diplomatic documents is too infrequently part of the equipment of the historian. The outstanding position occupied in this special field by such writers as Bryce, Foster, Mahan, Coolidge, D. J. Hill and J. B. Moore, is the outcome of their actual contact with the business of international negotiation. Yet in undertaking the tremendous task of resuming the documentary sources upon which his "History of the Origins of the World War" finds its sure foundation Professor Fay has shown evidence not only of intensive preparation, but also of a statesmanlike capacity to evaluate his material. Unlike many writers of so-called "diplomatic history," he generally shows an appreciation

of the day-by-day problems of "give and take" which condition the practical conduct of foreign policy.

The fact that Doctor Fay has so long reserved his judgments in a field where many essential factors are still lacking for a final verdict, is the best proof of his scholarship. No higher compliment can be paid the present work than to observe that his interpretation still leaves open many questions long since "solved" by lesser authorities and amateur diplomatists. His presentation, moreover, often permits the reader to draw conclusions from the array of evidence furnished, which the author would probably hesitate to advance as his own. Needless to say, the *Origins of the World War* is not a handbook for the undergraduates—much less a source from which inevitable decisions regarding "war guilt" and other controversial matters may be drawn by the general reader.

The picture that Professor Fay so skillfully draws of pre-war diplomacy offers a revealing study of the fatal effect of particular alliances upon the broader European situation. The clogging of the delicate machinery of the concert by the intrusion of motives of policy based on military *ententes*, naval "conversations" and other "defensive" agreements, is a tragical story, convincingly told. In the light of the evidence he presents, both the Triple Alliance and the Triple Entente appear as equally sinister obstacles to any conscientious decisions upon their actual merits of the diplomatic problems which arose during the period of their ascendancy in the councils of Europe. Intricate problems of loyalty and prestige, morbid jealousies, Quixotic gestures of support, hysterical appeals for sympathy and understanding—motives, in short, generally associated with non-political relations rather than statecraft—all appear as the inevitable price of these fatal military compacts.

Passing from questions of pre-war diplomatic method to the consideration of personalities, Professor Fay outlines a series of portraits—brief yet convincing—of the principal statesmen into whose hands the fate of nations was delivered. It is neither a gallery of heroes nor of rogues—rather of fallible humanity. Here we find Poincaré: "No one since Bismarck's day has equalled him in sheer ability"—although "one may not approve of his aims"; Sazonov: "Sincerely desirous of peace—but very sensitive of criticism" notably in regard to the heckling of the Pan-Slav Press; Bethmann, the German Chancellor: Equally helpless when opposed by the technicians of the war department at moments of crisis; Kiderlin-Wächter, Bethmann's mentor: Ineffectually "casting his influence in favor of keeping Austria in check, of good relations with Russia, of a naval understanding with England." In the case of none of these men does the author's presentation seem to imply the weakness of character or method that would place inevitable responsibility upon their shoulders. Concerning the well-intentioned but over-cautious Sir Edward Grey, his appraisal is less definite. (For a rather far-fetched example of Grey's "inconsistencies" see Vol. 2, p. 263.) For the

accidentally all-important diplomatic "adventurer" Berchtold, and by implication, for William Hohenzollern, he reserves the full weight of a scholarly indictment.

The American members of the Commission on Responsibilities at Versailles (Messrs. Lansing and Scott) were chiefly instrumental in saving the Emperor from the sanction of *ex post facto* justice. Doorn has since been growing steadily less and less important as a factor in practical politics. But, among a certain clique of American writers, the vanishing danger of an Imperial restoration has resulted in a policy of oblivion, especially evidenced in treating the "responsibilities" of the former Kaiser. Their benevolence has even been stretched to cover his actions during the earlier period of German diplomatic negotiation, when William was himself declaring that "Grey has no idea who is master here" (Vol. 1, p. 263). That he was personally responsible for giving a "blank check" to Berchtold that placed a noose around the neck of German diplomacy is practically undeniable. A damning indictment of William's "will to peace" might be based on the Szogeny document alone, aside from the earlier marginalia "now or never" and the perhaps sounder advise that Austrian action "ought not to be delayed" (Vol. 2, p. 203). The effect of this fatal language, reported to Berchtold, was to confirm the latter's cynical confidence, in the unlimited support of the Kaiser, and the Kaiser's all-powerful military entourage.

In his treatment of these matters Professor Fay's monumental study offers little that is available in the way of arguments or ammunition for the so-called "revisionist school"—unless these be found in the short and somewhat unconvincing chapter which he labels "Conclusion." What should have constituted the most closely reasoned paragraphs of the book give a curious impression that they are little more than addenda. The horrible "Dance of Death," so appropriately begun on the anniversary of Saint Vitus, will hardly lend itself to conclusions in this generation, however well pondered these deductions may be.

W. P. Cresson.

Das Amerikanische Freigabe-Gesetz. By Dr. H. Janssen. Mannheim: J. Bensheimer Verlag, 1928. pp. xiv, 304. Index. M. 20.

This commentary upon the Settlement of War Claims Act of 1928 is an illuminating treatise on one of the most complicated pieces of recent American legislation. The legislative purpose was final disposition of the outstanding issues between the United States and Germany as a result of the World War, namely: (1) Payment of awards to American nationals by the Mixed Claims Commission United States and Germany; (2) Return of property held by the Alien Property Custodian to former enemy nationals; (3) Adjusting of claims for German ships, radio stations, and patents taken over by the United States at the outbreak of the War. The book reflects the confident touch of those thoroughly conversant with the issue from a practi-

cal point of view. The foreword is by Dr. Wilhelm Kiesselbach, German Commissioner on the Mixed Claims Commission United States and Germany, and more recently Presiding Judge of the Hanseatic Supreme Court at Hamburg. The author, a lawyer of Bremen, was a member of the German legal staff sent to the United States to assist Dr. Karl von Lewinski, the Agent for the German Government before the Mixed Claims Commission in the adjudication of the broad issues of international liability.

The book is divided logically into the following parts: I. Historical introduction; II. Text translation, and commentary on War Settlements Act of 1928 (Public No. 122, 70th Cong. H. R. 7201—45 U. S. Statutes at Large 254); III. Appendices.

The historical survey summarizes the American attitude toward enemy property in time of war. A brief description then follows on the more important events contributory to the passage of the Act, including the seizures of German ships, radio stations and other German property, the Office of the Alien Property Custodian, the Knox-Porter Resolution and the Treaty of Berlin, the organization of the Mixed Claims Commission, the Kiesselbach-Mellon Plan, and the Green Bill.

The main body of the book is conveniently arranged with the text of the sections of the Act in parallel columns with the German translations of these sections followed by the author's explanatory comment. These notes evidence an intimate knowledge of American legislative history and procedure. They are full and complete as well as thoroughly annotated.

The concluding section of the book is a collection of seven appendices requisite to a proper interpretation of the legislation. These appendices include: (1) The text of the "Trading with the Enemy Act," with amendments to the original text in italics; (2) Regulations of the Treasury Department of March 15, 1928, for the payment of the awards of the Mixed Claims Commission; (3) Decision of the Commissioner of the Tripartite Claims Commission of April 9, 1928, fixing the Rate of Exchange and of Interest and the period during which interest shall run with respect to Interlocutory Judgments; (4) The President's Executive Order of April 23, 1928, delegating authority to subordinate officers to carry out the provisions of the "War Settlements Act"; (5) Treasury Decision 4168 of June 21, 1928, providing for computation of income, profits, and estate taxes; (6) Senate Report No. 1394, 69th Congress, 2nd Session, showing seizure and disposition by Alien Property Custodian of patents, trade marks, and copyrights; (7) Senate Report No. 273, 70th Congress, showing the plan of payment including the number, kind, and amount of awards to American nationals by the Mixed Claims Commission, and the estimated credits to special deposit account.

The book is the most complete commentary yet published on this intricate legislation. It constitutes a valuable handbook of great practical value to anyone interested in the War Settlements. The book is of special value abroad, where much of the legislative and administrative material would be

difficult to obtain from American sources. Dr. Janssen's extensive experience in Washington in intimate association with the officials charged with the duty of effecting a satisfactory settlement of the many involved issues, qualified him to write a semi-official commentary which is of great value to the interested practicing attorney and at the same time affords a concise and accurate historical record of the steps and circumstances comprising this international settlement as confirmed by our municipal legislation.

HOWARD S. LEROY.

Heading for the Abyss—Reminiscences. By Prince Lichnowsky. New York: Payson and Clarke, Ltd., 1928. pp. xxvi, 471. Index. $7.50.

The War Guilt. By H. W. Wilson. London: Sampson Low, Marston and Co., 1928, pp. xxiii, 366. Index. 21 shillings.

Prince Lichnowsky, of an ancient Polish family with estates in Austria and Prussian Silesia, entered the German Foreign Office in 1884 and served some twenty years in various legations. But in 1912, after the recall of Prince Wolff-Metternich, who had displeased the Kaiser, and after the death of Marschall von Bieberstein, who never really took up the London post, Prince Lichnowsky was suddenly summoned from his country estate and sent as German Ambassador to London. In an introductory note he affects ignorance of the reason for his appointment, suggesting sarcastically that it could not have been because of his abilities, "since of these the Foreign Office did not avail itself"; nor of his incompetence, "for had that been the case they would have thought of me sooner." The real reason for his appointment, which he refrains from mentioning, was an article which he published in July, 1912, which justified Germany's building of a large navy.

This article caught the fancy of the Kaiser, who forthwith scribbled a note in pencil offering the ambassadorship to Lichnowsky. Anglo-German naval rivalry had been the cause of Metternich's recall. Lichnowsky during his stay at London until the outbreak of the war carefully avoided this dangerous subject.

Considerably more than half of Lichnowsky's volume is a translation of the author's diplomatic despatches from London, which have already appeared in much greater completeness in the forty-volume German publication, "Die Grosse Politik," or in the so-called "Kautsky Documents." They give a good idea of Sir Edward Grey's zeal for the peace of Europe as Lichnowsky saw it, and also of the English intention to support France in case of a German attack. They also contain warnings of the danger to Germany of supporting too strongly the decaying Hapsburg Monarchy and its rash Balkan policies. The remainder of the volume comprises a reprint of the author's famous pamphlet of 1918, "My Mission to London," and various other short essays and thoughts which he committed to paper after his return to Germany upon the outbreak of the war. They discuss diplomacy and democracy, Germany's relations with Russia, the folly of dividing

up large landed estates (like his own in Silesia), and the mistakes of "the Great Man" (*i.e.*, of Bismarck). They are interesting studies of some of the problems that Germany fell heir to as a result of the war.

In the second volume under review Mr. Wilson has attempted the *tour de force* of recounting in some three hundred and fifty pages both the underlying and the immediate causes of the war. But this is not so difficult for him as at first sight might appear, because he says relatively little about Russia's responsibility and still less about that of Serbia. He concentrates his attention mainly on German and Austrian sins of omission and commission. He has read widely in the secondary works, and also in the sources like "Die Grosse Politik," from which he frequently quotes brief phrases to serve his purpose. As he states in his preface, "It is not fair to our own country that German and other foreign propagandist works should be issued broadcast and left without an answer." These words, and the dedication to President Poincaré who responds with a brief eulogistic foreword, suggest Mr. Wilson's point of view. No attempt can here be made to indicate all the points on which the present reviewer feels bound to differ from him, because the review would far outrun the editor's limit of space. He would only say that among other respects in which the book is of value and interest is the picture that it gives of the irritation and fear in English minds which was partly caused by Germany's pre-war diplomacy. Not least interesting is Mr. Wilson's severe criticism of Sir Edward Grey—not for any lack of peace efforts on his part, but because Grey failed to convert the Anglo-French Entente into a hard and fast alliance. "Had a definite alliance existed, by the almost unanimous evidence of continental statesmen, both in Germany and in other countries, the war would never have been fought. . . . Again, had a definite alliance existed, plans of war would have been prepared in common, and the French plan, No. 17, would probably not have been approved. . . . The British semi-alliance with France and Russia placed British policy in dependence on those two powers without giving the British government real control of their action or such partnership in it as a definite alliance secures" (p. 313).

SIDNEY B. FAY.

La Nationalité Française: Droit positif et Conflits de lois. By Pierre Louis-Lucas. Paris: Recueil Sirey, 1929. pp. 343. Fr. 45.

The French nationality law of August 10, 1927, which consolidated and codified French legislation of more than a century relative to nationality, has called forth numerous commentaries and interpretations. Among the best of these treatises is Mr. Lucas' *La Nationalité Française.* The book is divided into four distinct parts: in the first three chapters are analyzed successively the acquisition, the loss of, and the reintegration into French nationality, while the last chapter is devoted to the all-important problem of conflict of laws. The problems of French nationality are discussed, chiefly, on the basis of the 1927 law, but previous legislation, not abrogated by the new

law, as well as subsequent decrees and international conventions bearing on the problem, have also been considered.

The author discusses separately each possible situation. The acquisition of French nationality is treated under two divisions: original nationality, *i.e.*, nationality acquired by birth, either by *ius sanguinis*, or the *ius soli*, or the combination of both; and secondary nationality, *i.e.*, acquired by naturalization, marriage, or territorial annexation. In discussing nationality acquired by birth, Mr. Lucas distinguishes between legitimate and illegitimate children, a distinction singularly emphasized in the new French nationality law. The different ways by which French nationality may be lost, *i.e.*, by the acquisition of a foreign nationality either by naturalization, option or marriage, and as punishment (for the trade in or possession of slaves, employment in foreign public service, or for disloyalty of those who voluntarily acquired French nationality), are again taken up separately.

The author has spared neither care nor effort in subjecting each provision of the 1927 law to a minute legal analysis. He takes pains to point out the intent of the legislator, the change, if any, which has been effected against former laws in the situation under scrutiny. Each provision has been judiciously criticised with regard to the extent to which the legislator's intent will be satisfied in the practice by this law. The particular merit of Mr. Lucas' constructive criticism lies in the fact that his analysis has been conducted not only from the point or view of French public law but also from that of international law. He calls attention to every shortcoming of the new law, such as the lack of reciprocity in conferring nationality on certain classes of aliens, or the provisions inflicting the loss of French nationality as a punishment, and does not hesitate to deplore the repercussions possible from such shortcomings.

After indicating the conflicts which might arise, Mr. Lucas concludes that, while bilateral conventions undoubtedly will eliminate considerable friction, a truly satisfactory solution can be reached only by a universal convention, such as is now being considered by the League of Nations' Committee of Experts for the Progressive Codification of International Law, a convention whereby all nations would agree to uniform rules governing nationality.

Because Mr. Lucas' book indicates the juridical conditions, under which French nationality may be acquired or lost, the procedure to be followed in each case, and the individual or collective effects involved, it will be of great use not only to theorists and students but also to those officials who administer and to those practising lawyers who have to invoke the law.

FRANCIS DEÁK.

Jurisdiction in Marginal Seas. By William E. Masterson. New York: The Macmillan Company, 1929. pp. xxviii, 423. Index. $5.00.

The case of the *I'm Alone* with its attendant publicity has warmly revived the public interest in the coastal rum-runners, who had been crowded off the

front page for some five years. Mr. Masterson's book on jurisdiction over smugglers is thus peculiarly timely. One may recall that in the early prohibition-enforcing days, it was with the British Government that the State Department had to argue most frequently and with that government the first of the liquor treaties was concluded. The British have in this controversy been insisting that the littoral state has no right to exercise any jurisdiction outside the three-mile limit. When it own hovering laws have been mentioned, the reply has been that in 1876 they were brought "into harmony with the principles of international law," and the old claims abandoned.

Mr. Masterson makes a distinct and original contribution in his detailed exposition of the early English hovering laws, the first of which was passed in 1709. He has carefully searched the unpublished documents in the library of His Majesty's Customs at London. The interdepartmental correspondence, the instructions to the coast guards and the various reports, coupled with the familiar texts of the laws and supplemented by parliamentary debates and hitherto little-known court decisions, give a picture such as has never been presented before. Mr. Masterson clearly demonstrates that throughout the eighteenth century, British claims to jurisdiction over smuggling in marginal seas varied only with the activity of the smugglers and the resulting necessities of the case. He emphasizes anew the fact that even the Customs Consolidation Act of 1876 which was supposed to repeal all the Hovering Acts, is still applicable to foreign as well as to English vessels within four leagues of shore, since the statutory test of an "English" ship, based on part ownership and personnel, may have absolutely no relation to the actual nationality of the vessel.

In view of the approaching Codification Conference, at which these questions will be discussed, Mr. Masterson has done much service in throwing light on this problem. He soundly reaches the conclusion that the practice of the nations demonstrates the existence of a rule of customary international law permitting the exercise of jurisdiction for protection of the revenue and like interests outside the territorial waters of the state. Curiously enough, while Mr. Masterson stresses the important distinction between the two types of claims or rights, he shares the view of those who deny the existence of the three-mile limit, largely because the distinction between the varying claims is lost sight of. By failing to be consistent with his own distinction and by omitting to analyze the nature of the privilege claimed for various countries, he greatly weakens the force of his own argument. On this point the reviewer would also disagree with his interpretation of the two forms of the first article of the liquor treaties. Mr. Masterson's views are probably due to his belief that a state has only limited jurisdictional rights and not full sovereignty within the three-mile limit, though he relegates this important conclusion to a footnote (p. 400).

The latter half of the book deals with American problems, and largely those arising under the prohibition laws. The space allotted to the *Coquit-*

lam seems out of proportion. The reviewer would be compelled to take issue with a number of statements, such as: that, under the treaties, a seizure may be made within 12 miles of shore even if more than an hour's sail distant; the statement on the top of page 360, stating the holding in Milliken *v.* Stone; and the frequent reliance on the case of the *Vinces* (*e.g.*, Chapter V, notes 45, 56 and 61).

Some objection might be raised to the author's novel forms of citation, such as "Forn. Rel.," instead of the more usual "For. Rel." and "U. S. Press Release," instead of the more accurate "Department of State Press Release." But the book is extremely well documented and follows the sound policy of reproducing the texts of documents which are not readily accessible. Mr. Masterson has availed himself of many unpublished archives of the United States and Great Britain, the discussion of which, aside from its other merits, would make the book of permanent value.

PHILIP C. JESSUP.

Briefwisseling van Hugo Grotius. Edited by Dr. P. C. Molhuysen. *Eerste deel 1597–17 Augustus 1618.* The Hague: Martinus Nijhoff, 1928. pp. xxxiii, 659. Indexes.

In January, 1917, there was organized at Leyden the Committee for the Publication of the Works of Grotius under the chairmanship of Professor van Vollenhoven, for the purpose of collecting, collating, editing, and publishing a definitive edition of all the works of Grotius, including his correspondence, in a form similar to that already adopted in the memorial editions of Huyghens and of Descartes. In the years since then, increased interest in Grotius has been shown in the publication of the definitive Latin text of his *De Jure Belli Ac Pacis*, edited by Dr. Molhuysen, and by English translations of the *magnum opus* as well as of others of his juristic writings. The Committee addressed itself first to the task of preparing an edition of the correspondence of Grotius, the first volume of which now appears as one of the series of *Royal Historical Publications* of the Netherlands (number 64), the work having been committed to the scholarly care of Dr. Molhuysen as editor. As in the case of the editions of the correspondence of Huyghens and of Descartes, it was decided to print both letters to and from Grotius. The number of volumes of correspondence to be comprised in the series when completed is estimated at from ten to twelve. This first volume covers the years from 1597 to 1618. These were the years of youth, of the beginning of Grotius's friendship with De Thou and with other French scholars, of his entrance into the legal profession and public service, of the *De Jure Praedae*, of theological controversy, of his association with Oldenbarneveldt, of the tragic end of his leader, and the beginnings of his imprisonment at Louvestein. The second volume will probably extend to the year 1627, thus covering the period of the active preparation and writing of the *magnum opus* of 1625.

Heretofore the standard collection of the letters of Grotius has been the folio edition of 1687, edited by Hugo and John Grotius, grandsons of the great jurist. This contained about 2,500 letters, all from Grotius, of which 142 are within the dates covered by the first volume of the present edition. As there are 582 letters from and to Grotius in this volume, the bulk of the entire correspondence to the time of Grotius's death in 1646 assumes truly formidable proportions, of possibly not less than ten thousand pieces. If so, the estimate made in 1920 is obviously too low.

With the editorial supervision of the series in such competent hands as those of Dr. Molhuysen, it is without surprise that one becomes aware of the range of endeavor undertaken to give accuracy and finality to the texts as offered. Wherever possible, and this has been so as to about one-half of the contents of the present volume, every letter, wherever printed hitherto, has been collated with the original or with contemporary manuscript drafts and copies. This has resulted in many emendations. The well-known letter to Du Maurier of May 13, 1615, on the choice of reading for a diplomatic career, for example, shows more than thirty changes from the text given in the edition of 1687. Nearly all of the correspondence is, of course, in Latin. A few letters are in Dutch. The dates of many were incorrectly given in the earlier edition, and these are now corrected. Of the 582 letters contained in this volume, about one-fourth are printed for the first time. Of those from Grotius, the most important lot was found in the British Museum, being his letters to Isaac Casaubon, whose letters to Grotius, printed two centuries ago, are here reproduced in so far as they fall within the years covered by the volume.

Dr. Molhuysen's editorial labors do not end with furnishing a dependable text. His notes are full, adequate, even meticulous. Classical quotations, naturally abounding, are located; historical allusions are explained, and many puzzling biographical references are cleared up. The indexes include all names found in the letters, as well as the titles of all books referred to. The last are of great value. Finally, there is an excellent introduction in Dutch wherein the editor reviews these years of Grotius's life, calling attention to the significant additions revealed by the correspondence. Clearly the biography of Grotius remains to be written. No one, however, is likely to undertake it until this series is completed, and obviously this cannot be soon. Meanwhile all serious students of Grotius will be grateful to Dr. Molhuysen and his colleagues for having undertaken and so successfully pursued thus far a difficult and exacting task.

JESSE S. REEVES.

British Foreign Policy Under Sir Edward Grey. By Count Max Montgelas. New York: Alfred A. Knopf, 1928. pp. xviii, 142.

This little study, based upon the Memoirs of Sir Edward Grey, is here translated by William C. Dreher and is edited, with a Foreword, by Harry

Elmer Barnes. It consists of an examination of the earlier stages of Grey's development as a figure in British foreign politics prior to 1914, an intensive study of his attitudes and activities in the crisis of that year, and a Conclusion respecting Grey's responsibility for the turn of events at the outbreak of war. Notes to the Memoirs and other materials are added in support of the interpretations made in the text.

The book does not pretend to be a comprehensive treatment of the problem of war-guilt, and from this flow two consequences. The author is able to criticize Sir Edward, as an actor in the drama of 1914, with perhaps greater effectiveness than he would be able to treat of the responsibility of Great Britain if comparisons were made with the responsibility of other powers; he is also able at his discretion to introduce selected comments on the responsibilities of all other persons and powers in the problem as suits his own general attitude. With his critical treatment of Grey there is little fault to be found; if the British position had to be judged on the basis of the attitudes and actions of her Foreign Minister in 1914 her case would be weaker than it is taken in the large. On the other hand, the lack of a comprehensive treatment of all surrounding circumstances gives to the selected remarks which are made on war-guilt throughout the book a significance—usually implied rather than declared—which they would not have if the whole picture were presented. As a study of Sir Edward Grey, a critical study, the little work has undoubted value; as a contribution to the study of the whole problem of war-guilt it is of minor importance, for even the British position in 1914, relatively subordinate in importance to the part played by Russia, Germany, and Austria, cannot be judged solely or even mainly by reference to the personal shortcomings of one man.

PITMAN B. POTTER.

Manuel de Droit International Privé. 2d edition of Manuel de A. Pillet et J. P. Niboyet, d'aprês la même méthode. By J. P. Niboyet. Paris: Recueil Sirey, 1928. pp. xii, 1043.

The present volume follows substantially the outline of the former work, but practically all of the text has been rewritten. The treatment of the subject matter throughout is somewhat fuller than that contained in the first edition, with the result that the Manual has grown from 792 pages to 1043 pages.

Professor Niboyet accepts in the main Pillet's theory of the Conflict of Laws. He ascertains accordingly whether the social purpose of the law is best attained by ascribing to it permanency or generality of application. In the former case it would apply to French nationals even when they are abroad; in the latter case it would apply to all persons, including foreigners, in France. In the one case it would have extraterritorial, and in the other, territorial operation. Professor Niboyet finds it necessary, however, to supplement Pillet's theory by adding to his formula that "the extent of the

application of a law is determined by its social aims," the words "account being taken of the technical precedure by which it is attained."

In estimating Pillet's contribution to the science of the Conflict of Laws, Professor Niboyet is of the opinion that his fame will rest most securely upon his development of the notion of "vested rights." "To Pillet," he says, "belongs the honor of being the first to have formulated as a whole, with precision and in all its outlines, this very fruitful doctrine, forgetfulness of which has complicated in the practice innumerable problems which would have been resolved much more simply, if they had been placed upon their true ground."

The problem of vested rights, according to Pillet and Niboyet, is one of the two poles in Private International Law. The first is constituted by the determination of the governing law when the question relates to the *creation* of rights. The second intervenes to assure the recognition of what has been done conformably to such law. Professor Niboyet criticizes Dicey's theory on the ground that it seeks to reduce the whole subject of the Conflict of Laws to a recognition of vested rights. Before one can speak of a vested right, one must know how it came to be acquired.

In the matter of "public policy," Professor Niboyet's views differ fundamentally from those of Pillet. According to Pillet, any law that is general in its application is one of public order and any law of public order must be general. It follows that if the purpose of a law requires it to be general, the competency of this law is natural and normal. A law of public order is thus, not a law which constitutes a check upon a foreign law. It is the only competent law. Professor Niboyet, on the other hand, accepts the more general view, according to which a law of public order neutralizes a foreign law which would be applicable otherwise. It is exceptional in its character—contrary to the general rule. Its competency is not normal.

Vigorous independence of thought on the part of the present author is noticeable throughout the work. His treatment of the law of contracts may be taken as an illustration. Here he departs not only from the views expressed by Pillet, but also from those of other French writers. Professor Niboyet finds himself unable to accept a general formula as applicable to all classes of contracts, whether it be the law of the place of contracting, the law intended by the parties, or some other law, for the reason that it would be either too inflexible or too uncertain in its operation to meet the needs of business. On the other hand, he is unwilling to go to the length of holding that various aspects of a single type of contract may be governed by different rules. His suggestion is, therefore, that each type of contract be controlled, so far as possible, by the law of the state with which it is most vitally connected.

One of the outstanding features of the first edition of the Manual was its happy combination of a theoretical discussion of the subject with an exposition of the actual law of France, including the decisions of the courts and international conventions entered into by France. The same method

has been pursued in the present edition and with the same high degree of success.

ERNEST G. LORENZEN.

Recueil de textes usuels de Droit International. By J. P. Niboyet et P. Goulé. Paris: Recueil Sirey, 1929. 2 vols. pp. viii, 774, iv, 713. Table chronologique. Index. Fr. 146.

Messrs. Niboyet and Goulé have collected in these two volumes the texts of laws, treaties and conventions, bilateral and multilateral, which practising lawyers may need most frequently. Limiting their task, the authors have chosen three problems in which international law has attained considerable practical importance and increasingly frequent application, namely: Nationality, The Status of Aliens, and Conflict of Laws.

The first part of Volume I contains French laws, decrees and regulations relating to nationality and military service in metropolitan France, Alsace-Lorraine, and in the French colonies, protectorates and mandated territories; to the status of aliens, whether individuals, societies, or corporations. French legislation concerning conflict of laws is reproduced separately in conflicts relating to civil, as well as general commercial matters, maritime, fluvial and aerial navigation, industrial and literary property, criminal law, and, finally, questions of procedure, competence, and execution of arbitral awards and foreign judgments.

The second part of Volume I, and the whole Volume II contain bilateral and multilateral treaties to which France is a party. Bilateral treaties with 53 states are arranged in the alphabetical order of the countries. Under the multilateral treaties we find the text of several treaties now in force, such as the Rhine and Elbe conventions, treaties relative to motor-car traffic, maritime assistance, railroad transport, the Hague conventions relative to conflict of laws, various conventions relative to the protection of industrial and literary property, the recent labor conventions, and the pertinent part of the peace treaties concluded at the end of the World War. The collection concludes with some of the draft-conventions recently under consideration of various international conferences, such as the Hague drafts of 1928 relative to private international law, the maritime law draft prepared by the Brussels conferences in 1924 and 1926, the League of Nations protocols of September 24, 1923, and of September 26, 1927, relative to arbitral awards, the Pan-American conventions and the Bustamente code adopted at Havana in 1928. The Appendix contains fiscal laws and some recent conventions.

The chief value of this compilation is that it makes quickly accessible texts which in practice are most likely to be needed, but which heretofore took much time to locate in the *Journal Officiel* or in the endless volumes of the various treaty series. Moreover, a chronological list and a carefully prepared index make this work easy to handle.

FRANCIS DEÁK.

*Manual of Belgian Private International Law.** By Vicomte Poullet. 2d ed., Louvain, University Edition, Paris: Recueil Sirey, 1928, pp. 702.

Our eminent Colleague of Louvain, Vicomte Poullet, Minister of State, has recently offered the second edition of his remarkable manual of Belgian Private International Law. This work covers more than 700 pages, and regardless of what the author might say, goes beyond the framework of the notions of private international law, which are indispensable for a student presenting himself for the final examination for a Doctor in Law before our faculties.

After an introduction on the object and the characteristics of private international law, the first book of the manual contains the principles relative to the acquisition and loss of Belgian nationality according to our most recent laws; then some solutions relative to the conflicts of nationalities. The second book treats of the legal status of foreigners in Belgium, including that of moral persons and of the question which has been so much debated, namely, of their nationality.

The conflict of laws, the proper subject matter of private international law, occupies all of the third book, which is by far the most important part of the manual. A historical introduction on the theory of statutes leads the author to adopt an opinion similar to that of Savigny and of Pillet: Where the law is silent, it is the general social purpose of the law, which should be sought by the interpreter or the judge charged with solving the problem. Professor Poullet then proceeds to a detailed examination of conflicts, starting first with the problems of personal capacity, then property rights; he follows this up with an examination of legal acts: Formalities, substance, contracts, quasi-contracts, torts, quasi-torts and obligations born of the law without forgetting to give a very definite notion of that which must be understood by international public policy (*ordre publique*) of Belgium and the autonomy of the will. Afterwards we read of the applications of the principles connected with succession, gifts during life, testamentary gifts, marriage, divorce and separation, parentage, guardianship of minors, and the technique of certain contracts which are considered separately. At this point he does not neglect to indicate some interesting observations on the question of exchange, and of the inconvertibility of bank notes in certain cases.

The fourth and last book is entirely consecrated to the efficacy in Belgium of the judgments of foreign courts and of acts taking place abroad. The author's views are eminently practical because the exequatur, required in a fashion more or less strict by the new procedure in Belgium, is a problem with which all judges or lawyers are continually preoccupied.

We have given a sketchy résumé of this excellent manual, so substantial, which our learned colleague of Louvian offers to jurists; we counsel its reading and study to all those who interest themselves in the juridical questions

*Translation of the review from the French prepared by Thomas H. Healy, Ph.D., Professor of International Law, School of Foreign Service, Georgetown University.

of Belgium. Monsieur Poullet has not failed besides to indicate the difficulties of private law, caused by the annexation of the cantons of Eupen-Malmedy. But we think that the work merits the attention of international lawyers, who may even have little intellectual relation with our country; it is the rational conception and the excellent views of our distinguished colleague which makes of his work a strong source for all those who seek the solution of the conflict of laws (private laws) by establishing scientific arguments.

XAVIER JANNE.

The Mandate for Palestine. By J. Stoyanovsky. New York: Longmans, Green and Co., 1928. pp. xvi, 399. Index. $8.50.

Dr. Stoyanovsky's work on the general theory of mandates, published in 1925, has been accepted as one of the outstanding juristic contributions to the subject. He now makes use of the materials in that study as well as a detailed examination of the documents relating to Palestine to present an authoritative exposition of the legal situation in that country. The reader will find reviewed not only the terms of the mandate and pertinent articles of treaties, but provisions of the more important legislation dealing with the country, and numerous judicial decisions.

Perhaps the most original feature of the book is the analysis of the juristic recognition given to the conception of nationality since the war. Dr. Stoyanovsky believes that the scope of international law has widened so that now it may be said "to begin with nations, while previously it began with states. It is through this extension that Jews, constituting at the present time a nation without a corresponding state, should directly be dealt with by international law across the boundaries of the various states in which they reside" (p. 55).

The evidence for this new recognition of the nation as something distinct from the state is largely in the use of the phrase "national home" not only in connection with the Balfour declaration and the Palestine mandate, but also in connection with Armenia and in the establishment of the institutions of minority protection and mandates. The recognition of nationhood obviously involves less than the recognition of statehood, and is in a sense to be regarded as a step toward the latter. "If," writes Dr. Stoyanovsky, "the impossibility of granting self-government to a given community is due to such conditions as lack of geographical contiguity between the areas inhabited by its members or to insufficient numbers for the creation of an autonomous state, then the application of the principle of nationality to the above community would mean in certain cases recognition of a right to the special privileges embodied in the system of protection of minorities. If, on the other hand, it is due, say, to the lack of capacity to govern or to insufficient development, then the application of the above principle would be carried out through the special guarantees of the mandates system.

Thus, the two systems of recent creation, each in its own way, appear to be the necessary complements of the principle of nationality when full application of the latter, namely, the grant of unqualified independence, is considered either impracticable or premature" (pp. 53–54).

This thesis makes it possible for the writer to reconcile the Balfour declaration with the general principle of mandates which regards as fundamental the eventual self-determination of the people of the area. By assuming that the Jewish people are a nationality and through their historic connection are to be regarded as people of Palestine, the special provisions of the mandate in their favor are harmonized with the system as a whole. In spite of this reconciliation, the book is divided into two major parts dealing respectively with "the Jewish national home" and the mandate proper.

The first of these divisions deals with the position of the Jewish agency, the special requirements in regard to immigration, land policy, public works, concessions, and nationality. The second part restates the general principles of the mandate, especially the gratuitous character of the mandatory's mission, the principle of eventual independent statehood with which goes the duty of the mandatory to take the initiative in terminating the relation when the local community is able to stand by itself. In this connection, it would seem that the writer leaves the reader in a little doubt when he insists that "it is the mandatory, and he alone, who is in a position to take the initiative in this matter," but "if for some reason or other any such state should be reluctant to relinquish its control over a mandated territory and unduly delay the termination of the mandate, the Council of the League would then be called upon to take such steps as it might deem advisable to secure full execution of the mandatory trust" (p. 351).

It is unnecessary to go into the details of Dr. Stoyanovsky's precise legal exposition. Jurists will follow through his book with pleasure. In general, he regards the British administration of this mandate as in accord with the principles of the system and as wise in policy. "If," he writes "the mandatory has succeeded, as he undoubtedly has, in bringing the various communities in Palestine nearer to each other and making future coöperation between them much more probable than could at one time have been reasonably anticipated, his success is largely due to the intervention of the permanent Mandates Commission and its influence as an institution of the league on world public opinion and on such local public opinion as is gradually developing in Palestine."

As annexes the book contains texts of the Mandate for Palestine and the fundamental orders in council establishing government in the area as well as a carefully selected bibliography.

QUINCY WRIGHT.

Le Continent Américain et le Droit International. By Francisco José Urrutia. Paris: Rousseau & Cie., 1928. pp. xviii, 404. Appendix. Fr. 70.

Writing from a wide background of experience, not only in American but in world affairs, Dr. Urrutia describes in outline American contributions to the development of international law and its codification.

The story begins with the emancipation of the colonies of North and South America and carries through the Havana Conference of 1928. The outstanding accomplishments of the Congress of Panama, the six general Pan American Conferences, the various regional conferences, and the American scientific congresses are presented. Turning to the larger stage, Dr. Urrutia describes the part played by the American states in the Second Hague Conference; in the World War, when the sentiment of continental solidarity in defense of common interests was accentuated; and in the League of Nations, where these states have distinguished themselves by their democratic, liberal, and pacific attitude. The American states in the League have not, however, constituted a regional group similar to the Little Entente or the Baltic group. Their action has been independent, but influenced by like ideals and interests.

Dr. Urrutia describes the accomplishments in the codification of public and private international law by the various Pan American Conferences, the American Institute of International Law, and the Commission of Jurists at Rio in 1927, as well as the efforts of the American delegations to the League of Nations. The spirit of reconstruction completely dominates the movement for codification in America. Turning to the much mooted question of American international law, Dr. Urrutia takes the position that international law must be universal, but that there are, nevertheless, principles, problems and situations peculiar to the American republics demanding special solutions. The fundamental principles of international law being universal, their codification should be universal.

The volume concludes with an analysis of the more important provisions of the conventions adopted by the Sixth International American Conference.

A brief, select bibliography accompanies each chapter. An appendix lists various kinds of arbitration treaties concluded by American states; another gives the correspondence in which Costa Rica endeavored to get an interpretation of Article 21 of the Covenant from the League of Nations; a third gives the program of the League's first conference for codification and the project on territorial waters formulated by the Institute of International Law in 1928.

Dr. Urrutia has given a fair, well-balanced summary of American participation in the development of international law. His conclusions, scattered throughout the volume are, on the whole, free from particularism. A final, summarizing chapter would have been a welcome addition to the book.

LAVERNE BURCHFIELD.

A History of the Far East in Modern Times. By Harold M. Vinacke. New York: Alfred A. Knopf, 1928. pp. xxii, 479. Index.

The volume under review is published in the Borzoi Historical Series which seeks "to break with the conventional tendency to regard history as primarily a record of the thoughts and activities of man in the area of Western Europe." It is characterized by Harry Elmer Barnes, the editor of the series, as "the first attempt to provide a comprehensive and systematic college textbook on the modern history of the Far East." The purpose of the author, Dr. Harold M. Vinacke, is to follow the tenets of the writing of the "new history" to the end of depicting the influence of the contact of cultures on social change, thus portraying the impact of the West in the Far East (restricted to China and Japan) through an emphasis on economic, social and cultural transformations.

To this end Dr. Vinacke has departed from the conventional historical narrative by introducing chapters in the heart of the text on "Financial Imperialism" and the "Growth of Military Power" in China and five others on economic, social and intellectual changes in China and Japan during the period which followed, roughly, the middle of the nineteenth century. The result is a large volume containing much information on many subjects, and considerable that is not ordinarily found in books dealing with either the history or politics of the Far East. For the new student of Far Eastern history the textbook will be found of unusual interest and value.

But to supply in one text an adequate statement of historic fact concerning the multifarious events in the modern history of the Far East and at the same time to present adequate materials on the economic, social and ideational life of China and Japan and to use these materials in the interpretation of the historic events themselves, is a task not easy of achievement. To emphasize the interpretive in the body of a narrative chapter and in inserted chapters may compel the author to exclude important statements of historic fact, thus leaving the student with a hazy and dangerously confused conception of particular events as well as of their sequence. To reverse the emphasis may lead to the writing of a history which is removed from life—the more usual failing.

While generally the reviewer is of the opinion that Dr. Vinacke has maintained a careful balance of fact and interpretation, and while he is inclined in the classroom to give special attention to fundamentals in the social and economic life of China and Japan, his use of the text during the past year in a class on the Far East has led him to the conclusion that as an introductory textbook it lacks sufficient information on important events, both in internal and international history, which characteristic has made necessary continual reference to two recent books which Dr. Barnes presumes to be non-existent. As a reference work Dr. Vinacke's volume has special utility for students in a beginning course on the Far East, but the arrangement, which Dr. Barnes characterizes as "systematic," makes it very difficult to use for daily and

weekly assignments. The inclusion of the valuable chapters on Far Eastern society and economics breaks the continuity of narrative.

Dr. Vinacke's long interest in and familiarity with the Far East as shown by his other publications have made him a careful scholar. Textual criticisms of this his most recent book must, therefore, be very few. Attention might be called, however, to a few points which seem to the reviewer to require slight alteration. He seems to have fallen into a common error of confusing (p. 31) the "emperor's merchant" (1702) at Canton with the "Hoppo," the vulgar local for the Superintendent of Customs of Kwangtung Province (*Yueh Hai Kuan Pu* in Chinese). Dr. Morse (*The International Relations of the Chinese Empire*) does not make the distinction clear. Mayers' (*The Chinese Government*) statement that the origin of the term "Hoppo" is unknown was corrected in 1902 by H. Cordier (*Les Marchands Hanistes de Canton*), showing it to be a vulgar form of *Hu Pu*, or Board of Revenue, the Peking board to which the customs official reported. The trade monopoly which was originally given to the "emperor's merchant" later became the province of the *Co-hong* (Kung Hang) or general guild of Chinese merchants of Canton, and not of the "Hoppo" (Hu Pu), wrongly used for the local customs collector. Elsewhere (p. 148) Dr. Vinacke identifies Jung-lu, the Dowager's intimate, as a blood brother of Yuan Shih-k'ai, instead of a "sworn brother" or "blood covenant brother," an error in terminology also made by Dr. Treat in *The Far East*. They were neither of the same race nor family, but had entered into a "blood covenant" with each other.

Dr. Vinacke shows his careful scholarship, however, when he declares that "the formal relation of the government to the inception of the (Boxer) movement has never been fully established" (p. 151). It might be added, however, that it is by no means as uncertain now as it was before the publication of recent studies on the Boxer Rising by Dr. Duyvendak and by Dr. Steiger.

In his discussion of "Financial Imperialism," Dr. Vinacke has conveniently grouped certain phases of the impact of the west on China an appreciation of which is most essential to an understanding of China's contemporary foreign relations. China has been saddled, especially by Japan during 1917–1919, with loans for other than purely economic purposes. European finance is characterized as "the invisible tentacles of an octopus" in which China has been enfolded. Some advocates of pure history in a book of history might question the frequent use of "should" and the technical analyses of the relations of finance and diplomacy (pp. 175–176)—a method which might stigmatize a historian as doctrinaire—but in a text which seeks to interpret the economic and political effects of foreign finance in a country like China some considerable definition of terms, more especially terms like "imperialism," may require not only the attention given them by Dr. Vinacke but more. Wise placement of some loans has actually contributed in numerous instances in the Far East to preserving the integrity of China and a "fair field and no favor" for trade.

In dealing with recent events in China Dr. Vinacke is remarkably unbiased—for bias is to be expected in most books on the Far East—a fairness evidenced in his treatment of the foreign support of the Chinese generals Fêng Yü-hsiang and the late Chang Tso-lin. Likewise this is true of his interpretation of the Kuomintang which has a program to make it distinctive, but the members must henceforth "proceed to justify themselves by actions rather than by words" (p. 252). Bad memory is correctly attributed both to Chinese and foreigners (p. 269) who seek to justify a present policy by inaccurate reference to the circumstances under which foreigners acquired treaty rights and privileges in China.

A concluding observation on Dr. Vinacke's very readable text is the reviewer's impression that chapters 14 to 17 inclusive are the most valuable for students in a general course on the Far East, providing as they do convenient reference materials on the economic, social and cultural changes in modern China and Japan without an understanding of which much knowledge of treaty provisions in the foreign relations of these countries with the west must be but superficial.

C. Walter Young.

REVIEW OF CURRENT PERIODICALS

By Charles G. Fenwick

Bryn Mawr College

American Bar Association Journal, January, 1929

The Teaching of International Law in America, by Manley O. Hudson (pp. 19–23), reproduces an address before the Third Conference of Teachers of International Law, held at Washington, D. C., April 25, 1928. Attention has been given at past conferences to questions concerning the subject matter to be taught and the method of its teaching. The question now presents itself—by whom and to whom should international law be taught? What place should be given to international law in the professional training of lawyers and in the cultural training of citizens? The older method of teaching international law by deductions from moral philosophy is out of date and the later method of the case system is inadequate. The problem of today is that of understanding the effects of the transition in international law and of laying foundations for its development along new lines. A great volume of international legislation has been added to the body of doctrine which was developed in the course of the last century. Hence it would seem that specialization is necessary and that the professional law schools should devote themselves to the strictly legal aspect of the problem and that the colleges and universities should give their attention to courses on international relations in the larger sense, including international organization and politics, and economic and social factors. It is therefore proposed that the Conference urge the inclusion of international law in the curricula of all the law schools, the inclusion of courses on international relations in the curricula of colleges of arts and science, and the close coöperation between the teachers who are working in these two fields.

Ibid., May, 1929. *Mr. Hughes goes to the Permanent Court of International Justice* (pp. 263–270) offers a "sheaf of expressions representative of the feeling of fellow lawyers toward one of the most distinguished members of their profession." An address by William D. Guthrie on *Charles Evans Hughes* follows, surveying the judicial and political career of the newly elected judge. A note by Manley O. Hudson summarizes the *Progress of the Permanent Court*. The same writer also surveys in *Opinions of the International Courts* Nos. 15 and 16 of the advisory opinions of the Permanent Court and Nos. 12 and 13 of the judgments.

American Law Review, January–February, 1929

Who Owns the Air Space? by John A. Eubank (pp. 1–32), discusses the question *à propos* an advertisement in a daily newspaper offering for sale the permanent right of passage, at an altitude of over one thousand feet, in the

airspace over a tract of land on Long Island. After an examination of the common law as expressed in the maxim, *cujus est solum ejus est usque ad coelum*, the author notes the extent to which federal and state statutes conflict with the common law and finds both sets of laws of doubtful validity. A plea is made for complete clarification of the law.

Ibid., March, April, May, 1929. *The Red River Valley Controversy between the United States, Texas, and Oklahoma*, by George C. Lay (pp. 180–199), surveys the progress of a boundary dispute which involved principles of international as well as of constitutional law and which presented questions which were before the Supreme Court on thirty-seven different occasions.

American Political Science Review, February, 1929

America's Rôle in the League of Nations, by Manley O. Hudson (pp. 17–52), traces the changes in the attitude of the Government of the United States towards the League of Nations that have occurred since 1920, surveys the situation as it now exists, and forecasts some of the probabilities for the future. Whatever is to be said of the position taken by the United States, that its refusal to accept membership in the League of Nations is a closed issue, there remains the fact that the League continues to exist, that much of the organized political life of our time is centered at Geneva and that the longer the League lives and the more widely its activities develop the more insistent the question becomes of working out a more logical and effective way of coöperating "freely, fully, and helpfully" with the League, as was said by Secretary Kellogg in 1928 to be the policy of the United States. At present the United States can only follow where fifty other governments have pointed the way, it can only coöperate in plans devised by others, it can only pretend to be "helping" other peoples when it should be protecting its own interests as involved in the interests of the world at large.

Columbia Law Review, February, 1929

The Law behind Law, by John Dickinson (pp. 113–146), examines with scholarly reference to authorities the conception of a fundamental or higher law to which the positive law of the state is said to be subject. The "reason of the law" as a test of its validity, the theory that law is popular custom and has effectiveness as such, the theory that law is an inductive science to which the courts stand in the relation of expert discoverers or expounders, are aspects of the problem which have a direct interest for the student of international law.

Ibid., March, 1929. *The Law behind Law:* II (pp. 285–320) continues the analysis of ultimate legal authority and discusses the topics of law and science, law and the conflict of values, and law and legal theories. "At every point," concludes the writer, "the administration of justice according to law calls for something more than knowledge and manipulation of legal rules." Whether the judge is applying a firmly established rule or is creating a

precedent he must have at his disposal "the tools of policy," and he can only maintain the distinction between rule and the discretion which makes and applies rules by recognizing that "behind the rules of law, and behind their application, stands not 'Higher Law' but the judicial conception of *salus populi*."

FOREIGN AFFAIRS, April, 1929

Anglo-American Relations and Sea Power, by John W. Davis (pp. 345–355), after some general observations upon friendly relations between the United States and Great Britain considers certain specific matters likely to tax the friendly feelings between the two peoples, particularly the question of naval policy in so far as it involves a conflict over the extent of the freedom of the seas in time of war. It is impossible to "codify" international law so as to secure freedom of neutral trade under an assumption that future wars are to be of the old-fashioned, each-nation-for-itself, kind. "In the world of yesterday the dominant thought was national security against all comers. . . . The controlling idea today is world-wide peace against all disturbers. I am persuaded that a frank declaration on the part of the United States of its willingness to accept the implications and responsibilities which that ideal demands would do more than all else to convert it into a reality."

MICHIGAN LAW REVIEW, April, 1929

The United States and the League of Nations, by Clarence A. Berdahl (pp. 607–636), traces step by step the changes in the attitude of the Government of the United States towards the League from the original endorsement of the principle of a league or association of nations by Harding and his supporters during the presidential campaign of 1920 to the open repudiation of the "existing League" and the policy of non-recognition and then on to the policy of "unofficial and consultative" representation in the activities of certain of the League's commissions and later to the bolder step of open and official coöperation, all of which "indicates clearly that the United States is slowly but surely drifting into the League of Nations." Mr. Root in a recent address has stated that "the League in the political field and the Court in the judicial field have been rendering the best service in the cause of peace known to the history of civilization. . . . We, the great peace-loving people, what have we done to help in this wonderful new work? No sympathy, no moral support, no brotherhood. . . . The repercussions of our domestic strife seem to have prevented the effectiveness of our noblest impulses."

Ibid., May, 1929. *The Immunity of Foreign States when Engaged in Commercial Enterprises: A Proposed Solution*, by John G. Hervey (pp. 751–775), after calling attention to the recent increase in the commercial activities of governments and to the pending case involving the Franco-German potash cartel points out the unfortunate consequences that have arisen from the

decision of the Supreme Court in the *Pesaro* case and urges that a distinction be made between public and private governmental functions in respect to the claim of immunity. In view of the improbability that the United States would join in the convention proposed by a committee of the League of Nations waiving the immunity of sovereigns in cases involving commercial activities, the writer proposes that Congress enact a law expressly resuming all jurisdiction that has been impliedly or tacitly lost, and if necessary establish a special tribunal for the interpretation and enforcement of the law. *When Is a Treaty Self-Executing?* by Leslie Henry (pp. 776–785), reverts to the case of Foster *v.* Neilson and shows the mistaken inferences that have been made from it. The center of the present dispute over self-execution is Article II of the so-called "liquor treaties" which has been held to authorize seizures within the prescribed limits but not to extend the liquor laws to the new area. Whether a treaty is self-executing depends on the intent of the treaty makers as expressed in the treaty, and the intent must be determined by the language of the treaty, looking for words that are legislative in form and meaning, by previous cases involving the same type of treaty, and by the circumstances surrounding the making of the treaty.

VIRGINIA LAW REVIEW, November, 1928

International Awards, by Jackson H. Ralston (pp. 1–22), summarizes the more important features of arbitral awards and discusses a number of controversial points. Majority opinions, the reasoning of the award, reservations and protests, error as vitiating the award, and the execution and interpretation of the award are among the topics considered.

Ibid., February, 1929. *The Laws of War: Their Rise in the Nineteenth Century and their Collapse in the Twentieth*, by Sterling E. Edmunds (pp. 321–349), traces the historical development of the laws of war and the restraints and limitations accepted by governments down to the eve of the World War. The two doctrines of military necessity and of reprisal are fundamentally inconsistent with any system of law and their admission into the law of war was tantamount to the repudiation of whatever rules of conduct were prescribed. With the outbreak of war in 1914 one rule after another was set aside. "When the United States finally joined these two countries [Great Britain and France] as a co-belligerent she became a zealous abettor of the lawless practices she had so vociferously condemned, thus clothing them with a sort of final sanction for the next war."

Ibid., March, 1929. *The Doctrine of Sovereignty under the United States Constitution*, by Hugh E. Willis (pp. 437–475), while dealing primarily with a question of domestic constitutional law, raises issues which bear upon the nature of international law and the compatibility of such law with the sovereignty of the individual state.

Ibid., May, 1929. *The United States and the World Court*, by George Gordon Battle (pp. 643–648), presents the paradox of a country which from

the beginning of its national life has steadfastly supported and maintained the proposition that international disputes should be settled by judicial tribunals, but which is still not a member of the existing Court which undoubtedly owes it existence chiefly to the influence of the United States. "Coöperation must be the keynote of the international spirit of the future if civilization is to continue. To render that coöperation possible there must be machinery to adjust disputes between the nations. The World Court offers a method for adjusting these differences with peace and honor. After this long and heartbreaking delay it seems that we are now standing in the dawn of the day which will see our country a member of that great Court."

YALE LAW JOURNAL, December, 1928

The French Rules on the Conflict of Laws, by Ernest G. Lorenzen (pp. 165–192), concludes a series of articles the earlier installments of which appeared in the same review in 1927 and 1928. The present study covers the subjects of contracts, torts and workmen's compensation, property, matrimonial property, succession, and donations.

Ibid., January, 1929. *The Domicil of a Corporation*, by Joseph F. Francis (pp. 335–358), after enumerating a "list of assumptions" underlying the treatment of the subject proceeds to examine in succession the domicil of a natural person, the development of the concept domicil as applied to corporations, jurisdiction, taxation and other purposes of the test of domicil. The writer submits that it would be a step forward to abandon entirely the concept of the domicil of a corporation, which has become misleading, and to substitute some word or phrase more consonant with actual conditions.

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POLITICAL REASONS MAKING UNDESIRABLE AN INTERNATIONAL AGREEMENT AS TO FREEDOM OF THE SEAS

By William Ledyard Rodgers
Rear Admiral, U. S. Navy

The April number of the Journal has an editorial note by Professor J. W. Garner in which he reviews the status of "freedom of the seas" and states that "since the World War a new conception of neutrality has become widespread." He concludes that "the present chaotic state of the law is regrettable, if not an actual danger to the peace of the world," and thinks that the subject requires "preliminary study by jurists and naval experts."

Having been a representative of the navy on two international arms conferences, I venture to answer Professor Garner's demand for a naval view and shall defend the present "chaotic" state of the rules for political, economic and technical naval reasons.

We have recently had an example of what is possible as to codification of the rule of maritime neutrality in the convention signed at Havana on February 20, 1928.[1] It is a collocation of those rules which experience has shown to be generally satisfactory, but it avoids controversial matters and omits touching on any of the practices introduced in the last war by British Orders in Council and by regulations of the Federal War Trade Board. These novelties, which the convention sidesteps, make the "chaos" to which Professor Garner alludes. There are two noteworthy points in the convention. (1) Article I, par. 2, puts submarine action against merchantmen on the same footing as that of other men-of-war and so is far from sustaining the emotional (unratified) declaration of the Washington Conference. (2) The United States signed with a reservation as to Article XII, par. 3, regarding the status of armed merchantmen. So far as this reservation may be meant to refer to privateering and the Declaration of Paris, it expresses a needless consistency with former positions. The United States has not employed privateers in any of the three wars in which it has been engaged since 1856, and there is no probability of this or any other country doing so. All belligerents now wish to have their raiders under strict governmental control, and merchantmen employed in future wars as commerce raiders will doubtless have naval crews as in 1914–18. They will be more effective so. As for the armed merchantmen used in the last war and covered by the reservation, they were in no sense raiders, but were employed in regular trade. The first of them crossed the ocean while this country was still a neutral and they were armed solely to repel unprovoked submarine attack which we held unlawful. The armament of these merchantmen did

[1] Printed in Supplement to this Journal, Vol. 22 (1928), p. 151.

not assimilate them to privateers or to raiders for it was entirely defensive. The reservation of this country disapproves the only item in the convention in disaccord with the practice of the United States, but this item was unnecessary because Article I recognizes submarines when making captures in the usual way. Surprise attack by submarines in the last war was the only weighty reason for arming merchantmen, and such attack is less likely now.

Since the Havana Conference was unable to pass upon anything that gave rise to serious controversy in the last war, there is little probability that any more general conference than that of Pan-America would get any further in this matter. The explanation does not seem difficult. Some one has remarked with wit and flippancy that "law is an expression of the expediency of the day-before-yesterday." But the raillery is not without its element of truth. When we talk of a new rule of the "freedom of the seas" we are considering the expediency of the future; but as we can imagine little of the political, social, or economic conditions of the next important maritime war, we cannot wisely legislate today. Therefore it is difficult to believe that nations will limit their future freedom of political action beyond the indications of past experience. Since new inventions and new conditions are constantly arising, the Havana code has precisely the merit that its articles do not embody any disputed doctrine or try to forecast the future. It leaves untouched the new practices of the last war, and holds fast to what has proved good.

Professor Garner believes that aerial and submarine warfare have thrust upon us the need of new rules for warfare. It is very possible that he is right, but rules should not be made now, for the technique both of attack and defense are developing rapidly, and we do not know what will be advisable later. This is a point of which the public takes little notice. Neither aviation nor submarines are where the war left them, and the counter defense is perhaps moving faster than the development of attack. When the World War opened, the possibilities of the new weapons had not been thoroughly examined and at first they were little utilized. Necessarily, the means of defense lagged behind the methods of attack. The popular idea of the ascendancy of submarines is based on the spectacular destruction of three fine British cruisers in an hour by Von Weddigen's single submarine in 1914, and by the great merchant ship losses of 1917, which threatened the defeat of the allies. It is generally forgotten that later the defense developed and at the close of the war the submarines were no longer a decisive element. At the present time the sonic and supersonic submarine detectors which were initiated during 1918 are so efficient that a submarine's chances of concealment beneath the surface are much reduced, and only the boldest and luckiest of submarine captains will score success. It is the same with aviation. Current ideas of aviation in war are formed by our recollection of raids over London in 1916–17 and the early part of 1918, which were played up by the newspapers in this country, but most people fail to remember that during

the last three months of the war, not one hostile aircraft of either kind flew over London. The anti-aircraft devices have much improved since the war, and although both submarines and aircraft are seriously to be reckoned with in the next war, we cannot pierce the future sufficiently well to make rules for neutral commerce and blockades based merely on our anticipations as to the capabilities of these new instruments and their future technique.

Next as to our political position. When this country first advocated "free trade and sailors' rights" early in the last century, she was weak and her far-spread ocean trade was both solicited and oppressed by the combatants. Fruitlessly she demanded greater neutral rights, until at last she decided to fight the dominant sea-power. Now the situation has changed. The reasons which made us call for freedom of the seas a century ago, now make England assume our early stand. Our financial and economic strength backed by a navy not less than that of Great Britain are more reliable guarantees of our neutral rights than an international agreement would be. The desire of many in this country for such an agreement is grounded on a reminiscence of the past, while the wish of England for a restatement of the rule is based on an appreciation of the future.

Whatever may be done in time of peace to declare neutral rights, it will be difficult to enforce them in time of war. Commerce is the basis of industry and of war. The attack on commerce is an essential part of every warlike effort, and after war is declared it will be very hard for neutrals to persuade belligerents to abide by peace-time obligations if the attack on trade promises to promote success. We must recollect that the belligerents fight for national life; and the neutrals remonstrate for the sake of profit. Remonstrance will scarcely be effective unless it goes further than mere verbal appeals to a pre-war treaty. Warfare must always include attack on resources as well as attack on life. If the enemy can be cut off from his supplies he must yield. When nations go to war many men are drawn from industry to fill the army and at the same time the demands on national industry are vastly increased by the needs of the combatants for military supplies of every kind. Thus no nation can make war on a great scale unless it can greatly increase its imports, which it will pay for by borrowing money abroad. As both belligerents will depend largely on the freedom of importations for ultimate success, it follows that a serious neutral governmental effort to expand neutral trade with belligerents is an encouragement and support to both belligerents, tending to prolong the war and the consequent exhaustion and impoverishment not only of the combatants, but of all the world. On the other hand, if neutral governments, by peace-time legislation and international agreements, restrict their own nationals from selling to belligerents, they commit themselves to giving unneutral service to the combatant which has the best grasp on international communications. We cannot tell who that will be till the war comes. An agreement made now will hamper future political action.

For several decades before the World War the tendency of the development of maritime warfare and its rules had been to throw the burden of suppressing unneutral service upon the belligerents rather than on neutral governments. Thus, a neutral chartered supply-ship, following a belligerent fleet rendered unneutral service for which she was answerable to the other combatant, but not to her own neutral government. The present tendency of many suggestions is to establish rules throwing the burden of interrupting belligerent supplies upon neutral governments rather than upon the enemy's military efforts. Such is the nature of the present bill of Senator Capper whose effect is to authorize the President to decide which belligerent violating the Kellogg Pact has the best case in the next war and supply him only.

If such a bill becomes law, Congress will have attempted to decide today some great political action of the future without knowledge of future conditions, nor of the interests of the United States, nor of the sympathies of its people. Let us suppose that when the occasion arises to apply the Capper bill, the President supports the weaker Power, and says that it only is entitled to American supplies, then when the other combatant captures our supply ships bearing aid to his enemy the American administration will be in a very embarrassing situation. In short, our government will be able to uphold its views as to its neutral trade only by the threat of war or by actual recourse to war; but that is exactly where nations are now, except that neutral inaction does not entail loss of prestige. In their desperate need of success, belligerents will be restrained only by their fear of adding to their enemies, and this country should avoid making declarations she may not want to keep.

One of the novelties of the last war was modification of the old rule requiring visit and search at the time and place of meeting,—establishing the so-called Kirkwall practice,—whereby neutral ships were sent into port (usually Kirkwall) for more thorough examination than could be made at sea. While this country was still neutral, our government loudly objected to the usage, as a violation of the old custom. When at The Hague some years ago, attending the meeting on rules for aviation, I heard the subject fully debated, the British representative maintaining the propriety of the new rule and the American conservatively commending the old rule. It is quite possible that the English more or less abused the practice in order to annoy neutral trade and substitute their own, but in principle the practice seems very reasonable, on account of the great changes which have been wrought in recent times in the system of business communications. When the rule of search on the spot was established it was the only practicable way, and offered comparatively little difficulty with the small ships of the day. Nowadays, a big ship may have thousands of entries on its manifest and the necessary examination of the papers is prolonged beyond reason. Moreover, shipping news is passed about by radio so readily that in the recent war, the British Admiralty had no trouble in telling its cruisers to

intercept such-and-such a ship carrying such-and-such contraband, for its consuls gave necessary information in advance. Usually search was really unnecessary, the cruiser knew what was on board as soon as she identified the stranger. The question is important, but as harmony was not reached at The Hague in 1923, it is not probable that it could be reached now.

The opinion that some agreement with Great Britain about the maritime rule is essential for us to preserve friendly relations with her seems to me to have been originated in that country to alarm us into compliance with her wishes. Since the war her views have changed, as she has begun to realize the vast and increasing power of the United States and its far-reaching business connections overseas.

The rules of maritime warfare were settled at the close of the last war as well as they have been settled at the close of any previous war. The rules under which the victors won the war remain dormant, but not discredited. The British practice will be the basis of the rules for the next war, to be modified during the war under the pressure of belligerent need and neutral outcry as requisite, precisely as British necessity after 1914 departed from previous practice and the terms of the unratified Declaration of London. It was neither necessary nor desirable for the treaty of peace to pass upon the validity of measures that won the war for the allies. It was a victors' treaty and the victory validated the means of reaching success. As the matter stands now, no government need renounce its traditional views in time of peace, but when war comes the essential point is for belligerents to forecast rightly what measures they may take against neutral trade without causing neutrals to become enemies. There is no other adequate test of the new practices of the last war.

The suggestion that this country should agree to abide by the decision of the League of Nations as to "aggressors" would, if accepted, put us at the orders of the League without having any veto on its action as would be the case if we were among its members and represented in its Council. If our government undertakes to place an embargo on American trade, either of its own initiative, or at the order of the League, it must be sure the sympathy of its people is not with the alleged "aggressor." If the people sympathize with the aggressor nation, the administration will prefer to let the belligerents intercept American trade by blockade and by seizure of contraband, as customary. In either case freedom of choice when the emergency comes is the best position for our government.

The need of a law of maritime warfare to apply against an "aggressor" declared by the League does not seem very great, for if the League can reach the necessary unanimity of view, the "aggressor" will probably yield before overt steps have been taken by any one. On the other hand, should hostilities open without any League declaration, the League would not need a code for its special use. It may be remarked, however, that the practice of the British navy under the Orders in Council in force at the close of 1918

would make a very good code to be authorized by the League for application against a recalcitrant state. The suggestion that the Kellogg Pact furnishes the basis (or the reason) for an agreement between this country and Great Britain as to the rules of blockade does not allow much weight to the fact that as a belligerent relaxes the severity of the blockade, he will enlarge the list of contraband and get nearly the same results in interrupting hostile imports. For we must recollect that with national armies in the field, requiring the national resources to back them, all imports tend to sustain and prolong the war, and all will be obnoxious to the enemy. The importance of a large contraband list was shown in the last war. There was no real blockade. The so-called "blockade squadron" was a patrol to intercept contraband, and the contraband list was enlarged every now and then, until there was almost nothing free, and Germany was starved.

War in general is a political act, and neutrality also is a political act. A treaty on this subject is akin to legislation, and no legislative action should now be taken to restrict future political action. Legislation embodies experience and we cannot imagine either the political or social or economic conditions of the next war. Whether the next war is to be a two-party war or a League of Nations war, its declaration will be a political measure, arising out of an occasion now unforeseen. A formal pledge made now as to conduct of the war will prove as negligible as the Declaration of London was during the last war and for the same reason, namely, that legislation cannot be based on prophecy as to coming conditions.

Measures for the prevention and mitigation of war, which we all desire, are more likely to be successful if sought for along the political and diplomatic lines of conciliation and delay of hostilities than in peace-made treaties to regulate the conduct of war.

INTERPRETATION OF TREATIES

By Alexander P. Fachiri

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I was much struck, in reading the interesting editorial comment on the "Interpretation of the General Pact for the Renunciation of War" in the April issue of this Journal by the observations made regarding the admissibility of extraneous evidence for the purpose of construing treaties. The learned writer expresses the view that the intent of the parties may be sought outside the text of the agreement, not only in specific reservations, but also in "interpretations, clarifications, understandings, constructions, qualifications or actual conditions set forth during the negotiations prior to the ratification." This position is assumed to have the clear sanction of international law and also to be intrinsically desirable. In venturing to make the following observations I am not moved by the effect of the application of this principle to the particular case of the Kellogg Pact. My own view is that, broadly speaking, the interpretations contained in the diplomatic correspondence are implicit in the text of the Pact itself and, therefore, it is not of much practical moment to determine their precise legal effect. But the broader question of the method of construction of treaties in general is, in my opinion, not only important, but one of the most vital in international law at the present time. It goes to the root of international life today, which is so largely and increasingly based upon conventional provisions, involving as it does the issue whether states are to be bound by the engagements they have embodied in a ratified written instrument, or by supposed intentions which may be sought elsewhere.

What is the true canon of construction to be applied to international agreements? The doctrine laid down by Mr. P. M. Brown, and alluded to above, undoubtedly has the support of eminent Continental jurists, but it has always been strenuously opposed by English legal opinion. We start, as American lawyers must do, with our strict notions of what is admissible for the purpose of construing a private contract, or an Act of Parliament, and tend to apply the same rules to international compacts. But in so doing, we are moved by something deeper than the mere pull of our legal training, namely, the underlying reasons for exclusion. As Sir Frederick Pollock observes:

> The purpose of reducing agreements to writing is to declare the intention of the parties in a convenient and permanent form and to preclude subsequent disputes as to what the terms of the agreement were. It would be contrary to general convenience and in a great majority of cases to the actual intention of the parties, if oral evidence were admitted to contradict the terms of a contract as expressed in writing by the

> parties. Interpretation has to deal not with conjectured, but with manifest intent, and the supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded.[1]

This statement is applicable to international contracts, not only with equal, but with greater force. Not only is certainty even more important, as the interests involved are weightier, in international than in domestic affairs, but the conditions in which treaties are negotiated and ratified lends enormous additional force to these considerations. Plenipotentiaries meet in conference to negotiate a treaty. They discuss, bargain, make and abandon conditions, give undertakings, all with reference to the stage in the proceedings at which they have, at any given moment, arrived. Ultimately, a written text embodying the agreement finally arrived at is drawn up and signed by those plenipotentiaries, but they are not qualified thereby to bind the states they represent. It may be that, as a result of the exchanges between them, they attach a particular significance to such and such a phrase in the document, but they are not the parties who bear the burden or take the benefit of the agreement. Before it can acquire binding force it must be ratified, by whatever procedure the constitution of the high contracting parties requires, be it the crown as in Great Britain, or the legislature. The ratifying authority was not present at the negotiations; it may have before it the minutes summarizing the debates, but it is impossible for it, even if it would, to estimate and weigh all the implications arising or deducible from discussions from which it was absent. The authority whose consent alone gives force to the treaty is, in practice bound, and, I submit, entitled in principle, to base its action upon the text and nothing but the text. If so, it necessarily follows that the text alone should determine the rights and obligations arising from the treaty, and, provided it is intelligible, recourse cannot be had to extraneous evidence for its interpretation. In saying this I do not, of course, mean to exclude the consideration of the historical facts and circumstances leading up to the treaty, which can and, indeed, must be looked at to explain the "mischief" or purpose aimed at and the terms agreed upon, but in my view this is the only material outside the text that is properly admissible.

It may be said that the objections advanced to the consideration of verbal negotiations are not applicable to written exchanges by official diplomatic correpondence. I recognize that the force of those objections is less, in this case, but only less; they are still present. There may be instances where the great importance of the proposed treaty leads to an especially high degree of care and responsibility in framing the terms of the correspondence, with a relative increase in their authority, but in principle the position is the same; it is the final text of the treaty which embodies the intention of the parties and it is the text alone that is ratified.

[1] Law of Contract, 9th ed., p. 265.

A rule peculiar to the English law may afford but insecure anchorage for an international legal principle, and it is, therefore, satisfactory to note that a similar rule of interpretation prevails in Continental municipal law. Thus Article 1341 of the Code Napoleon provides that no evidence is receivable against or beyond the contents of written documents, and Dalloz, commenting upon this text, says:

> The written document constituting plainly statements which have a direct connection with the object of the contract, it is not permissible to prove by evidence that these statements, owing to an intentional or unintentional mistake or inexactitude, are in contradiction with the intentions or the will of the contracting parties. When the parties reduce to writing and sign a document to set out their agreement, the law, equally with common sense, must presume that they have inserted in that written document all that it was useful to include in it and that it contains the exclusive and accurate expression of their respective wills. This is a presumption of law against which no evidence is admissible except in the case of deceit or fraud.[2]

In the construction of legislative enactments, the French courts appear to adopt a looser method, in that they sometimes admit the debates and other preparatory work as evidence of the intention of the legislature in the case of an obscure or doubtful text.[3] In England, of course, such matters are entirely inadmissible, no matter how ill-drafted an Act of Parliament may be.

It has been said that public treaties are to be interpreted "like other laws and contracts,"[4] but the true analogy would seem to be with the second class to the exclusion of the first. In either case, however, those "general principles of law recognized by civilized nations"[5] which form one of the sources of international law, appear to negative the propriety of roaming at large among a mass of extraneous material for the purpose of discovering the supposed intentions of the signatories of treaties. And yet, it is undeniable that this has been, until recently, the common practice of international tribunals. I am convinced that this practice is wrong; and I venture to think that there is good ground for believing that it is in process of modification.

The question of the admission of extraneous evidence for the purpose of interpreting a treaty or convention has arisen before the Permanent Court of International Justice on several occasions. In one of its earliest cases, Advisory Opinion No. 2, which dealt with the question whether the International Labor Organization was competent in regard to agricultural labor, much prominence was given in the arguments in support of the affirmative to the preparatory work of the commission which drafted the labor clauses of the Treaty of Versailles. The French Government, which was contending for a negative answer, objected to the admissibility of this evidence, and

[2] *Jurisprudence Generale*, Vol. 33, Sect. 4717.
[3] Laurent, *Cours elementaire de Droit civil*, p. 15.
[4] Dana's Wheaton, Sect. 287.
[5] Statute of Permanent Court of International Justice, Art. 38.

presented a memorandum on the subject. The court referred to this point in the following passage of the opinion:

> Questions were raised as to the admissibility of this kind of evidence in the present instance, the contention being, in substance, that, as the terms of the treaty clearly excluded the claim of competence, there was no room for the consideration of extrinsic evidence to the contrary, and that Powers who took no part in the preparatory work were invited to accede to the treaty as it stood, and did so accede. The court does not think it necessary to discuss these contentions, as it has already on the constructions of the text itself reached the conclusion that agricultural labor is within the competence of the International Labor Organization, and there is certainly nothing in the preparatory work to disturb this conclusion.[6]

It is noteworthy that notwithstanding the emphasis placed on the preparatory work by those who upheld the competence of the International Labor Organization and the support it, in fact, gave their view (which was also the view adopted by the court), there is no mention whatever of it in the opinion, except for the passage cited, where it is dismissed. This passage is, of course, in a sense inconclusive, inasmuch as it does not indicate what line the court would have taken if the preparatory work had pointed in the opposite direction, but the course adopted by the court at least shows a preference for limiting its consideration to the text itself of the treaty under discussion.

The case of the Mavrommatis Palestine Concessions affords an example of the admission of extraneous evidence. In the course of the hearing, the court was apprised of the fact that the first draft of Article 11 of the mandate for Palestine (the crucial provision) contained a reference to a certain provision of the Treaty of Sèvres, which in the final text of the mandate, adopted at a time when it had become clear that that treaty would never be ratified, was replaced by the general phrase "international obligations accepted by the mandatory." No objection was taken to the admissibility of this evidence, and the court in its judgment drew inferences from it as to the meaning of the phrase in question.[7] The course adopted, however, stands on a different footing to the facile admission of extraneous matter which I have ventured to criticize. The evidence here was in the nature of historical material, leading up to and explaining the text under construction. It was not a matter of inferring the intentions of the parties to a treaty from statements made during negotiations, but of interpreting the terms of the mandate in the light of historical facts in which the mandatory had taken a leading part. In any event, as already mentioned, the court was not asked to rule as to the propriety of admitting the evidence.

A definite ruling with regard to the admissibility of statements made during treaty negotiations was given in the important advisory case relating to

[6] Advisory Opinion No. 2, p. 41. [7] Judgment No. 2, pp. 24–26.

the interpretation of Article 3 of the Treaty of Lausanne (the question of Mosul). The first point before the court was as to the character of the decision to be taken by the Council of the League in virtue of that article, which provided that

> The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.
>
> In the event of no agreement being reached between the two governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.
>
> The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision.

It was the contention of the Turkish Government that the rôle of the Council was merely that of mediator, and in support of this view it relied strongly upon a statement made by Lord Curzon in the early stages of the negotiations that no decision with regard to the frontier could be arrived at without the consent of Turkey.

At the hearing the Attorney-General formally invited the court to base its interpretation of the provision under discussion exclusively upon the text itself, and supported his submission by a reasoned argument, concluding with the declaration that H. M. Government regarded this principle of interpretation as one of the greatest possible importance for securing certainty in ascertaining the scope of international engagements and so ensuring their just observance.

In its opinion, the court dealt with the question as follows. After observing that the mission it had to fulfil was to interpret a treaty provision, it stated that "the court must, in the first place, endeavor to ascertain from the wording of this clause what the intention of the contracting parties was; subsequently, it may consider whether—and if so, to what extent—factors other than the wording of the treaty must be taken into account for this purpose."[8] The opinion then proceeds to analyze the article in detail and reaches the conclusion that the intention of the parties was, by means of recourse to the Council, to insure a definitive and binding solution of the dispute which might arise between them, namely, the final determination of the frontier. Having reached this conclusion solely by reference to the language of the treaty, the opinion states:

> Since the court is of opinion that Article 3 is in itself sufficiently clear to enable the nature of the "decision to be reached" by the Council under the terms of that article to be determined, the question does not arise whether consideration of the work done in preparation of the Treaty of Lausanne (*les travaux preparatoires*) would also lead to the conclusions set out above.

[8] Advisory Opinion No. 12, pp. 18, 19.

This is a perfectly definite ruling that where the final text of a treaty is sufficiently clear to enable the court to decide the point of construction in issue recourse will not be had to extraneous evidence. It is true that in the present case the court proceeded to examine the history of the negotiations and the Turkish arguments based thereon, but it is plain that this was not intended to detract from the ruling given. This is made perfectly clear by the following observations made in the course of this part of the opinion:

> But assuming that a study of the preparatory work led to the conclusion that Article 3 should be interpreted as though it had been adopted subject to the condition that the Council could not arrive at any solution without the consent of the parties, the action of the Council would in effect be reduced to simple mediation. Now this conclusion, which would eliminate the possibility of a definite decision capable, if necessary, of replacing agreement between the parties, would be incompatible with the terms of Article 3, the interpretation of which—as indicated, both from a grammatical and logical point of view as well as from that of the role assigned to that article in the Peace Treaty—has been set out above.[9]

This is particularly strong, inasmuch as it goes the length of holding that even a condition laid down in the course of negotiations must give way to the text of the treaty, interpreted according to its own terms alone, and without reference to the condition.

In the *Lotus* case the same principle was followed. In support of their thesis, the French Government maintained that the meaning of the expression "principles of international law" in Article 15 of the Convention of Lausanne should be sought in the light of the evolution of the convention, and referred to previous drafts and the proceedings thereon as showing that the parties did not intend to include within the jurisdiction of Turkey crimes committed in the territory of another state. The judgment states that "the court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself,"[10] and the court considered that the words "principles of international law" could only mean international law as it is applied between all nations belonging to the community of states. In accordance with its practice of dealing with all the contentions submitted to it, the court went on to consider the effect of the matters relied upon by the French Government, but it is again obvious that this was not intended to affect the ruling previously given.

Finally, the principle is once more affirmed in the advisory opinion relating to the jurisdiction of the European Commission of the Danube. A very large part of the Roumanian Government's case was founded upon statements and reservations made in the course of the negotiations leading up to the Con-

[9] Advisory Opinion No. 12, p. 23.

[10] Judgment No. 9, p. 16.

vention establishing the Definitive Statute of the Danube. The Attorney-General on behalf of Great Britain, as on previous occasions, submitted that all such evidence was inadmissible. The court, in effect, adopted this view, and the ruling in this case is of particular interest by reason of the character of the crucial provision under construction,—Article 6 of the Danube Statute. This states that "the authority of the European Commission extends, *under the same conditions as before, and without any modification of its existing limits*, over the maritime Danube, that is to say, from the mouths of the river to the point where the authority of the International Commission commences." There was acute controversy as to the effect of the words underlined, because Roumania was not a signatory of the Treaty of London of 1883 whereby the jurisdiction of the European Commission was extended from Galatz to Braila. She maintained that the words in question must refer to legal powers, which could only have been created with Roumania's express consent, whereas Great Britain and the governments associated with her contended that the reference was to the situation of fact. The court, without taking into consideration the *travaux preparatoires*, which contained a mass of material bearing upon this subject, held that the words referred to the conditions that existed in fact before the war in the contested sector, and that their effect was to maintain and confirm these conditions, thus putting an end to the questions which had arisen under the Treaty of London.

The opinion proceeds:

> Before entering upon the analysis of the contentions of the governments concerned, the court observes that the view which it has just developed as to the purport of the Definitive Statute is based solely on the language employed in the statute and on the historical facts upon which it rests, without any reference to preliminary discussions or drafts. The court adheres to the rule applied in its previous decisions that there is no occasion to have regard to the protocols of the conference at which a convention was negotiated in order to construe a text which is sufficiently clear in itself. If, however, some doubt could still remain upon the true meaning of the words *dans les memes conditions que par le passe et sans aucune modification a ses limites actuelles*, it will be shown later on that the preparatory work fully confirms the conclusion at which the court has now arrived.[11]

In respect of a declaration by the Roumanian plenipotentiary recorded in the protocols of the Danube conference, the opinion subsequently observes that "the Court must recall in this connection that preparatory work should not be used for the purpose of changing the plain meaning of a text."[12] Finally, the Roumanian Government, having placed great reliance upon a so-called Interpretative Protocol, drawn up by the members of the European Commission at the request of the conference, and included in the records of the conference, the court states that this document

[11] Advisory Opinion No. 14, p. 28. [12] *Ibid.*, p. 31.

> is not an international agreement between the parties to the Definitive Statute; it is not annexed thereto, whilst many interpretations of the articles of the statute were inserted in the Final Protocol, which has the same validity and duration as the convention to which it refers. The Interpretative Protocol is not even mentioned in the statute, which Roumania signed without any reservation, and can in no sense be considered as a part of it. . . . The court, therefore, can only consider the Interpretative Protocol as a part of the preparatory work. Whatever may be its importance from this point of view—and in this respect the court refers to what it has already stated above—it is certain that it cannot prevail against the Definitive Statute and therefore that it cannot be regarded as authoritatively stating that the European Commission possessed only technical and not juridical powers on the Galatz-Braila sector, even assuming, for the sake of argument, that this is the true meaning of the Interpretative Protocol.[13]

I think it is incontestable that the court has adopted the principle that international agreements must be interpreted by reference to their actual terms, without having regard to the negotiations or other *travaux preparatoires*. The only qualification is that the text must be "sufficiently clear" to enable this to be done. If this condition is present, the court will reach a conclusion upon the text itself, and I submit that it follows from the reasoning of the decisions that even if the *travaux preparatoires* contained matter inconsistent with the final text, the conclusion so reached would hold good.

Moreover the court does not restrict the scope of the conception of a "clear" text within narrow limits. It does not mean a text as to the interpretation of which there is no doubt or difficulty, but, if I may venture on a gloss, an *intelligible* text. I submit that the rule adopted by the Permanent Court can fairly be said to be that, provided a meaning can be attributed to the text of a treaty, having regard, of course, to the context of the provision under discussion and to the historical facts leading up to the agreement, extraneous evidence, be it verbal or written discussions and negotiations, including conditions and interpretations, cannot be used for the purpose of arriving at the true construction of the instrument.

In conclusion, I may add that I am aware that the Supreme Court of the United States has shown a disposition to adopt a somewhat looser method of interpretation than the one for which I am contending, and this must be a weighty consideration for English, no less than American lawyers. But the cases[14] suggest that the Supreme Court has not been faced with the dangers and inconveniences to which the admission of extraneous evidence as advocated by Continental jurists leads, and I remain convinced that the best interests of international relations and law will be served by the establishment of the stricter rule.

[13] Advisory Opinion No. 14, pp. 34–35.

[14] U. S. *v.* Texas, 162 U. S. 1, 23; Kirkhead *v.* U. S. 150 U. S. 483, 486; Terrace *v.* Thomson, 263 U. S. 197, 223; Nielsen *v.* Johnson, this JOURNAL, April, 1929, 422, 424.

THE ELECTION OF CANADA TO THE LEAGUE OF NATIONS COUNCIL IN 1927

By Frederic H. Soward

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For the political scientist, the constitutional position of the Council of the League of Nations offers a thorny problem. In general, the Assembly and Council are each empowered to deal "with any matter within the sphere of action of the League or affecting the peace of the world." [1] But, in addition, the Council is assigned special duties by Articles 6, 7, 8, 10, 14, 15, 16 and 24 of the Covenant and by the Treaties of Versailles, St. Germain, Trianon and Neuilly.[2] The First Assembly tried to delimit the powers of Assembly and Council, but it must be admitted that the report[3] presented to the Committee on General Organization by M. Viviani and Mr. Rowell (of Canada) was almost a confession of failure. They rejected comparisons with first and second chambers or legislative and executive bodies and added "the truth is that the League offers no analogy in constitutional law." The most recent League publication on the organization of the League contents itself with describing the Council as "a semi-permanent organ of the Assembly." [4] Undeterred by its anomalous position, however, the Council has steadily grown in prestige and moral authority until election to it is keenly coveted. It is the purpose of this article to trace the steps which led to the election of Canada to the Council at the Eighth Assembly. No finer compliment to the growing importance of Canada in international affairs has yet been paid, a compliment which came appropriately enough in the year of the nation's Jubilee of Confederation.

In 1918 most of the statesmen and legalists who drafted various plans for a League of Nations were generally agreed that there must be a special committee or conference at which the great Powers would be able to exert their proper influence without irritating interruptions from small states, jealously conscious of their theoretical equality with their mightier confreres. Lord Robert Cecil, in his first and second drafts of a constitution for the League favored a council composed exclusively of the great Powers, and frankly remarked to an American colleague at the Peace Conference that he thought "that the great Powers must run the League and it was just as well

[1] Articles 3, paragraph 3 and 4, paragraph 4 of the Covenant.

[2] As in Articles 48 and 213 of the Treaty of Versailles, Article 159 of the Treaty of St. Germain, Article 60 of the Treaty of Trianon, Article 104 of the Treaty of Neuilly, etc.

[3] Assembly Document 159/20/48/159/1.

[4] The Aims and Organization of the League of Nations (The Secretariat, Geneva, 1929), p. 23.

to recognize it flatly as not." [5] As might be expected, General Smuts was more sympathetic to the rights of small nations and in his famous pamphlet, *The League of Nations, A Practical Suggestion*,[6] proposed that the council should consist of representatives from the great Powers and in addition two delegates each from panels of "middle Powers" and "minor States." The great Powers should have a majority of one.

President Wilson, whose first draft of the Covenant entirely omitted any reference to a council,[7] was much impressed by Smuts' pamphlet and included the whole of his council scheme in the second draft of the Covenant.[8] When the American delegation arrived in Paris, David Hunter Miller discussed with Lord Robert Cecil and Cecil Hurst, the respective plans of the two countries. The result was the famous Hurst-Miller draft,[9] which dropped the Smuts' suggestion and substituted for it a plan for a council composed of the great Powers to which any state was to be added when its interests were under discussion. It was also suggested rather vaguely that "the Council may at any time co-opt additional members."

At the first session of the League of Nations Commission it was decided to make the Hurst-Miller draft of the Covenant the basis for discussion,[10] although until the last minute Wilson had intended to use his fourth draft [11] which retained the Smuts' plan for the council. It soon became very clear that the representatives of the smaller states on the commission [12] would oppose the preferential position of the council even to the extent of threatening not to join the League if the scheme went through.[13] As the historian of the conference has put it, "the problem of 'equality of states' was raised in its acutest form." [14]

Lord Robert fought hard for the supremacy of the great Powers, but he had only luke-warm support from President Wilson, and both France and Italy showed sympathy with the small nations, who presented a united front.[15] He finally surrendered, and after long debate it was agreed that the

[5] David Hunter Miller, The Drafting of the Covenant (New York, 1928), Vol. 1, p. 53. The Cecil plan is given in Vol. 2 of Miller, Doc. 6.

[6] Miller, *op. cit.*, Vol. 2, Doc. 5.

[7] It was first published in Ray Stannard Baker, Woodrow Wilson and the World Settlement (New York, 1923), Vol. 3, Doc. 10.

[8] Miller, *op. cit.*, Vol. 2, Doc. 7.

[9] *Ibid.*, Docs. 12 and 13.

[10] The French and Italian Governments later presented draft plans (Miller, *op. cit.*, Vol. 2, Docs. 19, 20, 21) which were much less complete. The Italians proposed to include in the Council four members elected by all League members.

[11] Miller, *op. cit.*, Vol. 2, Doc. 14.

[12] The smaller states were represented at first by five members and later by nine, as compared to the ten delegates from the five great Powers.

[13] C. Howard-Ellis, The Origin, Structure and Working of the League of Nations (London, 1928), p. 90.

[14] H. V. Temperley, History of the Peace Conference of Paris (London, 1920), Vol. 2, p. 27.

[15] Florence Wilson, The Origins of the League Covenant (London, 1928), pp. 32–37.

Principal Allied and Associated Powers [16] should hold permanent seats on the Council while there should be four non-permanent members to be selected by the Assembly. It was also agreed that any state should be invited to the Council when matters affecting it were under debate and that the Council might later be enlarged in membership if approved by a majority of the Assembly.[17] Until the Assembly should meet, Belgium, Brazil, Greece and Spain were to act on the Council. The choice of Belgium was an obvious tribute to that country for her war effort and a consolation for her failure to secure Brussels as the seat of the League. Spain was the largest of the neutrals, while Brazil was the largest of the Latin American States. Greece was in good standing through the personal prestige of Venizelos. The presence of Japan on the Council was thought adequate representation for Asia, although the American delegation favored the claims of China.[18]

During the debates of the commission the possibility of the Dominions securing or desiring a council seat did not seem to have been specifically discussed. Wilson had opposed their representation at the Peace Conference, but once he had given way on that point he did not think it fair to protest at their separate membership in the League.[19]

It was only while the Covenant was being put in its final form for the printer that the British delegation discovered a possible Ethiopian in the wood-pile. Lord Robert Cecil pointed out to David Hunter Miller, who was supervising the printing of the English version, that the working of the Covenant as approved by the commission, only provided for the election of "states" to the Council and did not employ in Article 4 the usual expression "members of the League." Such phraseology, it was feared, would bar the Dominions from election to the Council. Mr. Miller tells us in his masterly treatise on the drafting of the Covenant that he felt the use of the word "State" in Article 4 was "a clear and definite limitation," [20] and he did not feel free to change the wording of the article on his own initiative. He consulted Colonel House, who approved of his position and told him that personally he was opposed to Dominion representation on the Council.[21] Consequently, in a letter dated April 22, 1919, Mr. Miller refused the British request on the ground that "it was the intention of the Commission to exclude the Dominions and colonies from such representation." President

[16] This is the only place in the Covenant where the phrase is used.

[17] Article 4 of the Covenant, pars. 1 and 2. Professor Rappard thinks it was probably the neutrals who secured the provision for expanding the Council. Rappard, "The Evolution of the League of Nations," Problems of Peace, 2nd ser. (London, 1928), p. 9.

[18] Miller, *op. cit.*, Vol. 1, p. 477. Howard-Ellis, *op. cit.*, p. 139.

[19] Baker, *op. cit.*, Vol. 1, p. 284. Miller hints (Vol. 1, p. 492) "that probably some of the British representatives" regretted the developments.

[20] Miller, *op. cit.*, Vol. 1, p. 479.

[21] *Ibid.*, p. 480. House had also opposed a suggestion to make Newfoundland a member of the League. (Miller, *op. cit.*, Vol. 1, p. 477.)

Wilson, in company with Colonel House, supported his view.[22] Lord Robert was very much disturbed by this denouement and told Colonel House that "the Dominions felt they were being discriminated against, although they did not expect to be in the Council and did not want to be." [23] President Wilson was so impressed by the feeling of the Dominions that he changed his opinions [24] and supported a British memorandum circulated among the delegates requesting approval of the desired change. As a result permission was secured, though at the French insistence the word "state" was retained in Articles 8 and 6.[25] The episode left rather a bad impression among the Dominions' delegates and led to Sir Robert Borden bestirring himself to secure the famous memorandum from the "Big Three" on May 6, which unequivocally recognized the right of the Dominions to election to the League Council.[26] Only Sir Robert can tell us if at that time he foresaw the day when Canada would present her candidature for the Council to her fellow-members, but in 1919, as at the Imperial War Conference of 1917, Canada's War-time Prime Minister paved the way for the future growth in importance of his country.

The smaller states did not feel perfectly satisfied with their victory at the Peace Conference, and showed at the early sessions of the Assembly a tendency to watch the Council and the great Powers very closely. The first president of the Assembly, M. Hymans of Belgium, was careful to emphasize the equality of states as "one of the features of this Assembly" [27] in his closing address. The chief Argentine delegate presented a motion endorsing the principle of the election of all council members and, as we have seen, attempts were made to define the powers of Council and Assembly. On the other hand, the Assembly re-elected, without serious opposition, the states named at the Peace Conference as temporary council members until the Assembly had met, with the single exception of Greece, since the fall of Venizelos "*devenue pour l'Entente persona ingrata.*" [28] China replaced Greece.[29] In the eyes of a French enthusiast for the League, the Council remained somewhat akin to the Holy Alliance, "democratic in name but conservative and authoritarian in spirit." [30]

The question of membership in the Council remained a perennial source of

[22] Miller, *op. cit.*, Vol. 1, p. 481. [23] *Ibid.*, p. 481.

[24] Sir Robert Borden has paid tribute to Wilson's "consistently considerate attitude towards the Dominions" in his Canada in the Commonwealth (London, 1929), p. 109.

[25] Miller, *op. cit.*, Vol. 2, Doc. 31.

[26] Borden, *op. cit.*, p. 112.

[27] Quoted in "The First Assembly of the League of Nations" (World Peace Foundation, Vol. IV, No. 1, Boston, 1921), p. 11.

[28] Georges Scelle, "*La Société des Nations à Genève—Les Debuts de son Evolution,*" *Revue Politique et Parlementaire*, Vol. 106 (1921), p. 347.

[29] Geographic considerations led to the choice of China. *Cf.* Arnold J. Toynbee, Survey of International Affairs, 1926 (London, 1928), p. 12.

[30] Georges Scelle, "*De Genève a Washington,*" *Revue Politique et Parlementaire*, Vol. 109 (1921), p. 169.

difficulty in the Assembly until the explosion of 1926. This was natural, since it involved the relations of the great and small Powers, the ambitions of middle states to reach the dignity of a permanent seat on the Council [31] and the jealous desire of the small states to secure a rotation of office on the Council for at least the temporary members. In 1921 the temporary members of the Council were re-elected, but an amendment was adopted to Article 4 of the Covenant which gave the Assembly the power to fix by a two-thirds majority the rules "dealing with the election of the non-permanent members of the Council and particularly such regulations as relate to their term of office and the conditions of re-eligibility." As amendments require the consent of all council members, this amendment did not come into effect until 1926, owing to its non-ratification until that date by Spain and France.[32] The Third Assembly enlarged in 1922 the number of non-permanent members to six, with only Holland dissenting, and did so with the Council prompting the step. This change of heart on the part of the larger Powers seems to indicate a realization that the presence of small powers on the Council, especially if they became satellite states, was an aid rather than a hindrance, provided the process did not go too far. Mr. Howard-Ellis, a close observer of Geneva politics, suggests that the increase was "due to the Spanish objection to introducing the system of rotation . . . , to Allied (particularly French) unwillingness to drop any of their smaller clients from the Council, to the desire of part of the Assembly to see an "ex-neutral" on the Council and to the craving of the South Americans for more seats." [33] In filling the six temporary seats the Assembly re-elected three of the previous members, dropping China because of her internal difficulties. The new council members were Czechoslovakia, Sweden and Uruguay, the Little Entente thus gaining a spokesman and Latin America asserting its numerical strength. A resolution was also approved unanimously and reiterated in 1923, 1924 and 1925, that in electing temporary members the choice should be made with "due consideration for the main geographical divisions of the world, the great ethnical groups, the different religious traditions, the various types of civilization and the chief sources of wealth."

From 1922 until 1926 no change took place in the council membership, although there was considerable dissatisfaction at the lack of rotation of office and the tendency of elected members to cling limpet-like to their positions. The failure of some council members to ratify the amendment to Article 4 was also the cause of soreness among the smaller states. This feeling was expressed in a resolution presented by a Venezuelan delegate to

[31] In 1919 Spain had presented to the Peace Conference a claim to a "special situation on the Council (Toynbee, *op. cit.*, p. 22) and in 1921 a request for a permanent seat had been endorsed by Britain (The Seventh Year Book of the League of Nations, World Peace Foundation, Vol. X, Nos. 2 and 3, p. 145). In the same year a Chilean delegate had presented her claim and that of Brazil without success.

[32] The Spanish action was due to the failure to receive a permanent seat while France was probably shielding her ally, Belgium.

[33] Howard-Ellis, *op. cit.*, p. 140.

the Assembly of 1925 and adopted unanimously by it.[34] "The Assembly, noting that the non-permanent members of the Council at present in office have been re-elected for a year, considers the meaning of the re-election to be that it is subject to the non-permanent part of the Council being renewed as from the election of 1926 by application of the principle of rotation." [35]

When the Council called an extraordinary session of the Assembly in March, 1926, to admit Germany to the League the long pent-up feelings burst out in a dramatic and unfortunate fashion which involved the League in considerable discredit. Germany had made it clear that, in entering the League, she expected a permanent seat on the Council in virtue of her rank as a great Power. This was in accordance with paragraphs one and two of Article 4 of the Covenant which, as Mr. Toynbee has tersely put it, "show clearly that the intention was essentially to assign permanent seats on the Council to the great Powers, all the great Powers and none but the great Powers." [36] But middle states like Brazil, Poland and Spain felt that they, too, should receive recognition as permanent members of the Council and assiduously cultivated, with considerable success, the good graces of the great Powers. China joined in the struggle for preferment, on general principles, and the resulting clash of ambitions led to the collapse of the Extraordinary Assembly [37] and the temporary postponement of the entrance of Germany into the League. The members of the Council atoned for their sins as much as possible by creating a special committee to recommend changes in the composition of the Council, which included delegates from the ten council members and from Germany, Argentine,[38] Poland, China and Switzerland. Ironically enough, in view of his attitude in 1918, it fell to the lot of Lord Cecil to take the lead in drafting a plan for enlarging the Council which it was hoped would meet the claims of Spain, Brazil and Poland. His original plan provided for an increase of non-permanent council members to nine. These should serve three years, one-third retiring each year. A retiring member might stand for re-election if he secured a two-thirds majority of re-eligibility from the Assembly, but not more than three members of the Council could receive the privilege at any one time. It was understood that election should still further recognize geographical and other considerations and that three of the nine seats should be the perquisite of Latin America.[39]

[34] Spain did not vote.

[35] Journal of the Sixth Session of the Assembly, Sept. 27, 1925.

[36] Toynbee, *op. cit.*, p. 10 ff.

[37] Good accounts of this controversy are to be found in Toynbee, *op. cit.*, Part 1A, Sect. 1; The Seventh Year Book of the League of Nations, *op. cit.*, and William E. Rappard, "Germany at Geneva," Foreign Affairs (New York, 1926), Vol. 4, No. 4.

[38] The selection of Argentina, absent from the Assembly since 1920, was significant and was probably meant as a reproach to Brazil.

[39] Report of the first session of the Committee on the Composition of the Council. (League of Nations Document, C. 299, M. 139, 1926, V.)

The committee had not openly rejected the creation of permanent seats for the middle Powers in their discussions, but it was obvious that they did not intend to satisfy the desires of these states. Accordingly Spain and Brazil gave during the summer the necessary two years' notice of withdrawal from the League, the most convincing proof of their dissatisfaction.[40] Before leaving, Spain ratified the amendment to Article 4 previously referred to.[41] As France had also done so a short time before, the way was clear for the Assembly to act as it wished on the composition of the Council. In the second session of the committee it was definitely stated that only Germany was to receive a permanent seat at the September Assembly.

The Seventh Assembly adopted the recommendations of the committee with one important addition, though some of the states sharply questioned the wisdom of increasing the number of the Council and pointed out that the withdrawal of Spain and Brazil had removed the principal motive for creating extra seats. There were complaints that the Council was "railroading" the measure through and there was the usual utopian desire that the invidious distinction between permanent and non-permanent seats should be abolished.[42]

The important addition to the scheme was a clause, which Lord Cecil had favored in the committee, giving the Assembly the right at any time to decide by a two-thirds majority to proceed to a new election of all the non-permanent members. This provision makes impossible in future the repetition of the procedure by which Brazil had held up the March Assembly. For the first elections it was necessary that only three states should secure a full three year term and that three should receive a two year term and three a one year term to bring the scheme into proper working.

The elections were extremely interesting and keenly contested. No less than seventeen states were voted upon for the nine seats, four from Latin America,[43] three from Asia, nine from Europe and two British Dominions,—the Irish Free State and Canada. Canada had not been a candidate but was given two complimentary votes. Sir George Foster, in a speech to the Assembly the day before the elections, was careful to emphasize the fact that "Canada was making no claim for a seat on the Council but she considered it pertinent to point out that she had equal rights to representation on the

[40] Spain withdrew her resignation in 1928 and was elected to the Council at the Ninth Assembly receiving also a certificate of re-eligibility.

[41] See above, p. 757.

[42] Professor Rappard makes the interesting suggestion that all council members should be elected with a number of candidates equal to the number of the great Powers considered to be indefinitely re-eligible. *Cf.* Rappard, The Evolution of the League of Nations, *op. cit.*, p. 16.

[43] There was some dissension among the Latin American States at their usual caucus before the election. *Cf.* The communication from the Uruguayan delegation, read to the Assembly after the council elections. Journal of the Seventh Ordinary Session of the Assembly, Sept. 17, 1926.

Council with all the other fifty-six members of the League." [44] The Irish candidature was unexpected and was said to have been launched without instructions from Dublin.[45] A French writer claims that it was displeasing to Sir Austen Chamberlain, which would not have been entirely surprising.[46] Nevertheless, Ireland secured ten votes, ranking thirteenth on the list. The successful members were Poland,[47] Roumania and Chile for three years, Holland, Colombia and China for two years, Belgium, Salvador and Czechoslovakia for one year.

When the Eighth Assembly held its council elections in 1927 the elections were now on a normal basis as only three candidates were to be chosen, each to receive a three year term. The elections were marked by three features, the refusal to give Belgium the right to stand for re-election under the re-eligibility clause, the election of three states never before on the Council, and the successful candidature of Canada.

Belgium had served on the Council since the very beginning, was a Locarno Power and *persona gratissima* with the great Powers, who backed her request for a declaration of re-eligibility at the Seventh Assembly.[48] It was thought that she was certain of re-election,[49] but when the vote was taken she received 29 votes out of 48 cast, thus failing by three votes. The defeat was generally considered to have been meant as a vindication of the principle of rotation and as a rebuff to the influence of the great Powers who, as it will be remembered, were rather in disgrace at the Assembly because of their "hotel conversations." [50] The selection of three new members was a further indication of the determination of the Assembly to escape from the old habit of leaving the positions of prestige to a favored few, even though it involved a temporary sacrifice of efficiency.

The election of Canada was far from being a "walk-over" and deserves careful examination. Besides Belgium, whose elimination undoubtedly released votes for the election from which Canada would benefit with the others, several states were in the running. The Persian delegates planned to make the attempt as they had done in 1926, but the presence of China on the Council was an obstacle to their ambitions and they withdrew from the race, contenting themselves with reading a formal statement before the

[44] Journal of the Seventh Ordinary Session of the Assembly, Sept. 16, 1926.

[45] Arnold J. Toynbee, The Conduct of British Empire Foreign Relations since the Peace Settlement (London, 1928), p. 58, quoting The Times of Sept. 17, 1926.

[46] Georges Scelle, "*Le Bilan de la Septième Assemblée de la Société des Nations*," *Revue Politique et Parlementaire*, Vol. 129 (1926), p. 81.

[47] Poland was also given a declaration of re-eligibility, obviously as a recompense for not receiving a permanent seat. In 1929 she was consequently re-elected.

[48] She had been elected for a one year term in 1926. All observers agree that the great Powers supported her.

[49] According to The Times special correspondent, one of her delegates claimed she was promised 38 votes.

[50] Nansen was said to have led the opposition to Belgium. *Cf.* The Times (Weekly Ed.), Sept. 22, 1927.

election explaining why Persia should be on the Council.[51] Both Portugal and Finland were again contesting the elections and Finland had the support of the Scandinavian bloc and was respected because of her stability and rejection of Soviet overtures.[52] The candidature of Portugal was not so important in view of the instability of the government of that country. The most formidable contestant was Cuba, who was certain to secure one of the three seats in view of the unwritten agreement that there should be three Latin American seats in the Council.[53]

Her leading delegate, M. Aguero y Bethancourt, was known in Geneva as the "Great Elector" in "view of his activities in the lobbies in rounding up the Latin American vote." [54] The last serious contestant was Greece, represented by Nicholas Politis, an able international lawyer who worked with M. Beneš in drafting the Protocol of Geneva of 1924, and was Ambassador of Greece at Paris. He was in close touch with the Little Entente and in favor with France, but he seems to have spoiled his chances by being over-eager for the favor of the great Powers. His speech in the Assembly, in which he modified considerably his enthusiasm for the Protocol as feasible in the near future, was resented by several delegates, to judge from the criticism it received in the speeches of orators who followed him.

The Canadian candidature was not the subject of popular interest or demand in Canada before our delegates left for Geneva. Not even the most ardent nationalist had urged that Canada should so demonstrate her increased importance in world affairs. The Ottawa correspondent of the *Times* hints that the candidature was due to the initiative of French-Canadian members of the Cabinet; and this would seem quite possible in view of the activities of Senator Dandurand and M. Lapointe.[55] According to Sir Herbert Ames, Senator Dandurand did not have the authorization of the Canadian Government prior to his arrival in Geneva.[56] Shortly after his

[51] The Times (Weekly Ed.), Sept. 22, 1927. Persia was elected to the Council in 1928 when China had to retire.

[52] This is the view of Georges Scelle. *Cf.* "*La Huitième Assemblée de la Société de Nations*," *Revue Politique et Parlementaire* (1927), Vol. 133, p. 102.

[53] It is difficult to understand the Latin American influence at Geneva in view of their general attitude and when so many of these states do not attend Geneva. In 1927, for example, 12 were present and 5 absent. *Cf.* Percy Alvin Martin, "Latin America and the League of Nations," Political Science Review, Vol. 20 (1926); Don Augustin Edwards (of Chile), "Latin America and the League of Nations," Journal of the Royal Institute of International Affairs, March, 1929; and Howard-Ellis, *op. cit.*, pp. 104, 105, 133. However, in 1929, Peru, Bolivia and Honduras returned to the Assembly.

[54] Howard-Ellis, *op. cit.*, p. 150. It was charged that in 1926, Cuba had not stood for election because of opposition from the United States, but this was denied. *Cf.* "Cuba and the Platt Amendment," Foreign Policy Information Service, April 17, 1929, Vol. 5, No. 3, p. 61 ff.

[55] The Times, Sept. 15, 1927. Mr. Toynbee is rather critical of the government for its action in this connection. *Cf.* The Conduct of British Empire Foreign Relations since the Peace Settlement, p. 60.

[56] Sir Herbert Ames, "Canada and the Council," The Bulletin of the League of Nations Society in Canada, Jan., 1928, p. 5. Sir Herbert was treasurer of the League of Nations from

arrival he was visited by M. Lange, of Norway, who urged that Canada should contest the elections and stated that he thought the Scandinavian states and Germany would probably vote for her.[57]

When Senator Dandurand arrived at his hotel he found there instructions from Ottawa to make an attempt to secure the election of Canada, if he thought conditions were favorable. His first step was to secure the consent and support of the British Empire delegates, which was readily afforded in the hope that Canada might blaze a way for the others.[58] The Canadian delegation made no attempt to bargain for votes[59] and had the satisfaction of seeing Canada secure third place in the elections. In the voting Cuba secured forty votes, Finland thirty-three, and Canada twenty-six, twenty-five votes being required to secure a majority. Greece was given twenty-three votes and Portugal sixteen, while scattered votes went to Uruguay, Denmark, Siam, Switzerland and Hayti.

What are the factors which led to the election of Canada? For it should be remembered that Canada secured a seat at the expense of a European candidate[60] and had to face the natural dislike of Continentals at seeing two representatives from the same empire sitting on the Council. It should not be forgotten as well, that Sir Austen Chamberlain, while respected, was not loved in Geneva after his famous speech of September 11th, which killed the hopes of reviving the Protocol. Much of what is said here in explanation is based upon surmise,[61] and upon comment in Geneva and European capitals at the time, but it should be noted.

Without question, the personality of Senator Dandurand was a factor which materially assisted towards Canada's success. One French observer

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1919 to 1926, a delegate from Canada to the League Assembly in 1926, and in close touch with the Canadian delegation in 1927. He says that several states urged Canada to stand for election in 1926 and that the Canadian delegation reported favorably upon this suggestion when they returned to Ottawa.

[57] This would mean seven or eight votes. The writer was informed of this by Sir Herbert Ames.

[58] There are contrary views as to the attitude of Sir Austen Chamberlain. The Times correspondent says he welcomed the election "whole heartedly." The Times (Weekly Ed.), Sept. 22, 1927. But M. Pinon in the *Revue des Deux Mondes*, Vol. 141 (1927), p. 715, declares that Sir Austen was not keen on the proposal.

[59] Ames, *op. cit.*, p. 5.

[60] Mr. Toynbee suggests in his Conduct of British Empire Foreign Relations since the Peace Settlement, pp. 59–60, that Canada was competing against Cuba for an American seat on the Council; but this can hardly be the case as these seats were regarded as *Latin American* seats and Canada had never worked with these states in their caucuses on Council elections. It is surprising to find M. Paul Mantoux grouping Canada with Latin America for Council elections. *Cf.* Paul Mantoux, "The Working of the League Council," Problems of Peace, 3d ser. (London, 1928), p. 41.

[61] The writer has had conversations and correspondence with members of the League Secretariat upon this point, but the names of his informants, for obvious reasons, cannot be quoted.

went so far as to attribute it almost entirely to him.[62] A delegate to three Assemblies, the only British delegate who has been elected president of the Assembly (1925), a master of both English and French, he was well-known and liked in Geneva. At the opening of the Assembly, Senator Dandurand had been elected chairman of the second committee and was consequently well in the public eye. His speech to the Assembly on September 12th was described by Mr. Wickham Steed as "the most helpful British speech yet delivered," [63] and pleased the delegates by its liberal tone in contrast to the cautious admonitions of Sir Austen. Senator Dandurand showed a much more generous attitude towards arbitration and the compulsory jurisdiction of the Permanent Court of International Justice than did the British Foreign Secretary, and also made an important reference to minorities that did not pass unnoticed among the ex-enemy states. After emphasizing the difficulty of the problem and his own position as a member of a minority, Senator Dandurand declared, "It was the highest expression of civilization for a government to make a minority forget that it was a minority." [64] The *Frankfurter Zeitung*, in commenting on the Council elections, declared that Canada owed her election to her treatment of the minorities problem.[65]

It is believed that the contrast between the British and Canadian speeches at the Assembly induced some delegates to vote for the election of Canada in the impish hope that her presence on the Council might embarrass British policy and in the belief that it might heighten the interest of the Dominions in international problems. Canada was also valued as a "neutral" state which could play a valuable part on the Council by increasing the scanty number of states whose impartiality in European affairs was obviously more possible than for those Continental members with embarrassing commitments. With no grievances for which she sought redress, with no lost subjects to plead for, with no boundary dispute to cause a guilty conscience or a troubled spirit, Canada could be expected to furnish delegates who could act as *rapporteurs* on controversial problems for which it is customary to choose a *rapporteur* who is free from bias as far as possible. Her stable government was also a factor in her favor that should not be overlooked. Lastly, Canada was naturally recognized to be in close touch with the United States and in sympathy with some of the motives underlying American policy.[66] With the aid of her embassy at Washington she could act as a liaison officer between Washington and Geneva and "interpret" the American point of view, as in

[62] Pierre de Querielle, "*L'Esprit International à Genève*," *Le Correspondant*, Vol. 309 (1927), p. 199.

[63] The Observer, Sept. 18, 1927.

[64] Journal of the Eighth Ordinary Session of the Assembly, Sept. 13, 1927.

[65] Quoted in the Round Table, "Germany and Geneva," Vol. 18 (1927–1928), p. 16.

Senator Dandurand has since shown his sincerity on this question by bringing the position of minorities before the Council in March, 1929, and offering concrete suggestions for improvement. He again discussed the question at the Tenth Assembly.

[66] *Cf.* The Canadian position on Article 10 of the Covenant.

the past she has done at the Imperial Conferences. Thus the *Manchester Guardian* said that the election of Canada expressed the desire of the Assembly to choose a "North American Anglo-Saxon country" which could be "a direct mouthpiece of the great Republic that holds so obstinately aloof."[67]

The success of Canada was generally received favorably throughout Europe and the Empire [68] and was almost universally regarded as a clear-cut recognition by the rest of the world of the changed position of the Dominions as defined at the last Imperial Conference. As the Canadian Prime Minister said, "it showed a definite recognition of Canada's individuality as a nation." [69]

In Paris, M. René Pinon, the political editor of the *Revue des Deux Mondes*, thought that, in general, Canada would side with Great Britain on League issues but would not hesitate to take an independent line on some questions.[70] H. Wilson Harris, in a special article contributed to the liberal weekly, *L'Europe Nouvelle*, summed up his conclusions in the statement, "She (Canada) is far enough away geographically to have the point of view of a deliberate observer; she is near enough spiritually to view European problems sympathetically." [71] It is true that M. Georges Scelle was dissatisfied, since he feared that Canada would reinforce "the Anglo-Saxon influence exercised at present for obstruction," but he consoled himself with the reflection that it might pave the way for "an entire *rapprochement* with the United States." [72]

Canada has still almost one year of service on the Council, and we should watch with interest her future policies at League conferences. Since the election there have been indications of Canada's wider appreciation of the honor paid her. The presence of the Canadian Prime Minister at the Ninth Assembly with a notably strong delegation and the speech he delivered during its debates were good auguries for the future. The announcement during the debates in Ottawa on the Peace Pact of Paris that the Canadian Government had circularized the other members of the

[67] The Manchester Guardian (Weekly), Sept. 23, 1927.

[68] The Spectator, Vol. 139 (1927), p. 452, devoted a leader to it, and *L'Europe Nouvelle* secured a special article from H. Wilson Harris, the English journalist and League enthusiast, for its issue of Sept. 24, 1927.

The New York Times of Sept. 16th published a special article by Wythe Williams.

[69] Mr. MacKenzie King's statement to the press, Sept. 19, 1927. In his statement the Prime Minister quoted as "especially pleasing and noteworthy" the remark of the London Times, "There could have been no more emphatic international affirmation of that historical definition of British Imperial relations which was given at the last Imperial Conference."

[70] René Pinon, "*Chronique de la Quinzaine*," *Revue des Deux Mondes*, Vol. 141 (1927), p. 715.

[71] H. Wilson Harris, "*Le Canada au Counseil de la Société de Nations*," *L'Europe Nouvelle*, Sept. 24, 1927.

[72] Georges Scelle, "*La Huitième Assemblée de la Société des Nations*," *Revue Politique et Parlementaire*, Vol. 133 (1927), p. 103.

British Commonwealth regarding the adherence of Canada to the optional clause of the Statute of the Permanent Court of International Justice was another straw in the wind.[73] The recent advocacy of the cause of minorities at the March Council meeting was also significant. Canada is coming of age in international affairs and may be expected to play an increasingly important rôle in the struggle for peace and coöperation.

[73] House of Commons Debates, Feb. 19, 1929. At the Tenth Assembly Canada signed this clause.

THE FORMER FOREIGN SETTLEMENTS IN KOREA

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The unsolved problems arising from the foreign settlements and concessions in China are of such a nature as to make a study of the former foreign settlements in neighboring Korea a timely contribution to the literature on the general subject. The very contrasts which the settlements in Korea present to those in China serve to clarify the problems in the latter country.

Since early in the seventeenth century a few Japanese were permitted to live in Fusan, Korea, under conditions comparable to those of the Dutch at Nagasaki. They accepted the onerous restrictions for the sake of the strictly limited annual trade permitted them.[1] After a series of manoeuvers, which are not within the province of this study, the Japanese Government succeeded in 1876 in making with Korea that country's first modern treaty as the opening wedge in its campaign for dominance in the peninsula, and secured concessions not even allowed the Chinese, the nominal suzerains. At that time no Chinese subject was permitted to live within the borders of the kingdom, and all trade between the celestial empire and her traditional vassal was conducted either through a trading post between Wiju and Chungkiang at the Yalu River, or through the annual tribute-bearing embassies sent from Seoul to Peking.

The new treaty provided:

> In addition to (Fusan), the Government of Corea agrees to open two ports . . . for commercial intercourse with Japanese subjects.
>
> In the foregoing places Japanese subjects shall be free to lease land and to erect buildings thereon, and to rent buildings, the property of subjects of Corea.[2]

One year later the Japanese gave force to this treaty by reaching a definite agreement concerning the Fusan settlement. In contrast with the later general foreign settlements with which this survey is more particularly concerned, the site of the new settlement was rented, for fifty yen annually, by the Japanese Government from the Korean Government, and not by individuals. With the exception of the breakwater, whose repair was within the province of the Korean Government, the whole responsibility for the maintenance and operation of the settlement was the privilege and duty of the Japanese Government.

By a convention in 1879, Wonsan was designated as a second open port,

[1] Hulbert, H. B., History of Korea, II: 59.

[2] Art. IV, Treaty of Kangwha, Feb. 26, 1876; Inspector General of Customs, Treaties, Regulations, etc., between Corea and other Powers, 1876–1889, Shanghai, 1891; pp. 1 *ff.*, hereafter cited as "C. T." Many documents cited are unpublished.

and arrangements were made for the establishment of a Japanese settlement there. While the first general survey of the area was to be the duty of the Korean Government, the preparation of the sites, the laying out of the streets, and other developments were the obligation of the Japanese Government.[3] By special agreement in 1881 the annual rental for this settlement was fixed at fifty yen, with one yen extra for a cemetery, the same rate as that at Fusan.[4]

Both of these leases were very informal and rather indefinite. In neither did the Korean Government relinquish rights of police supervision over the leased areas, yet by interpretation this right was given up in fact. The settlements were specified as leased, not ceded. While the low rents would seem to indicate an attempt to maintain this as a principle, there was no provision for the termination of the leases. Apparently they were concluded in perpetuity, and perhaps on that basis they could have been construed as concessions, although it does not appear that any such claim was ever made. No doubt the Korean Government viewed the settlements as a convenient means for the segregation of unwanted aliens under the direct supervision of their own officials.

These Fusan and Wonsan settlements may be compared to the British concessions at Hankow and Canton. In both cases the leases were to a foreign government which sublet small areas (in the cases of Fusan and Wonsan solely to its own nationals), and in both cases the complete legal control of the leased areas passed into the hands of the foreign Power, although presumably the sovereign title remained with the lessor nation.

In the American treaty of May 22, 1882, the Korean Government, through Li Hung Chang, the true author of the treaty,[5] specifically preserved to itself sovereign rights over areas to be leased in the future. Article VI of the treaty stated:

> Citizens of the United States who may resort to the ports of Chosen which are open to foreign commerce shall be permitted to reside at such open ports within the limits of the concessions[6] and to lease buildings or land or to construct residences or warehouses therein. . . .
>
> . . . it is expressly agreed that land so acquired in the open ports of Chosen still remains an integral part of the Kingdom, and that all rights of jurisdiction over persons and property within such areas remain vested in the authorities of Chosen, except in so far as such rights have been expressly relinquished by this treaty.[7]

Instead of the previous Japanese conventions, the American treaty became the model for other Powers in the matter of leased areas.

[3] Aug. 30, 1879, C. T. pp. 36 *ff.*

[4] C. T., pp. 39 *ff.*

[5] Dennett, Tyler, Americans in Eastern Asia, p. 459.

[6] There appears to be no warrant for the use of the word "concession." The effect of Chinese example, however, is plain.

[7] C. T., pp. 45 *ff.*

By the convention of August 30, 1882, Japan secured the opening of a third port, Chemulpo, and extended the treaty limits of the three open ports from ten to fifty *li* in all directions, with the additional *proviso* that after two years these limits were to be extended to one hundred *li*.[8] This extension would have thrown open Seoul, the capital, had not the British and German treaties of 1883 done so. (In all extensions of rights the United States shared through the most favored nation clause in her own treaty.)

In September, 1882, in conjunction with Korean envoys, Li Hung Chang drew up regulations for maritime and overland trade between China and Korea, the fourth paragraph of which specified:

> The merchants of either country who may proceed to the open ports of the other country for trade will be allowed to rent land or houses and to erect buildings . . .[9]

The nearest port to Seoul was Chemulpo, a squalid fishing village distant from the capital twenty-six miles by road and fifty-three miles by river, situated on a large bay having a daily tide of thirty-three feet. It was four miles from Inchun, the prefectural town. Half of the day the water front was a long expanse of mud flats and only the smallest boats could approach the shore. Nevertheless, this place was chosen as the most convenient port for direct communication with the capital, and as early as 1880 the Japanese minister, Hanabusa, selected part of the uninviting mud flats just above tide water as a site for a Japanese settlement.[10] Few, if any, Korean houses were in this area, and only the demands of foreign trade caused the growth of the important modern city of Chemulpo.

It would appear by inference from the American treaty and the Japanese Chemulpo settlement agreement that even before the signing of the former treaty the establishment of a general foreign settlement at Chemulpo was planned. By the Japanese settlement agreement, which was made on September 30, 1883, and which showed marked influence of the American treaty, it was agreed that Japanese subjects might reside at their convenience either in the strictly Japanese or in the projected general foreign settlement. The area assigned the Japanese, after being cut into lots, was to be leased to individual Japanese by the Korean Government; rents were to be paid by individuals to the representative of the Korean Government, the superintendent of trade, or *kamni;* auctions of lots were to be conducted by the *kamni;* and titles were to be issued to individual Japanese leaseholders by the Korean Government. The Japanese Government entered into the transaction only through the exercise of ordinary consular functions. This agreement was in great contrast to those for the Fusan and Wonsan settlements where the contract was directly between the two governments.[11]

[8] C. T., pp. 62 *ff*. There are three English miles in ten Korean *li*.
[9] C. T., p. 67.
[10] Allen, H. N., Korea Fact and Fancy and Chronological Index, p. 158.
[11] C. T., pp. 126 *ff*.

Lots were divided into three classes, and the annual ground rent was fixed according to the class at twenty, thirty, and forty Korean cash for every two square meters. One-third of this rent belonged to the Korean Government, and two-thirds, deposited under proper security with the *kamni*, constituted a municipal fund and was administered by the *kamni* and the Japanese consul in conjunction. In consideration of the history of the relations of Japan and Korea during this period, it is safe to assume that the *kamni* had little, if any, say in the administration of this fund. The lots were leased by auction, the upset price being two hundred fifty Korean cash. The Korean Government retained three-quarters of the upset price and paid one-quarter into the municipal fund; one-half the price realized in excess of the upset price went to the municipal fund. Title deeds in perpetuity for the lots were issued to the lessees and a fee of one thousand cash was charged for the deed. Should the lessee fail to pay the rent within a prescribed period, the *kamni* was empowered to move the Japanese consul to deal with the matter, but no provision was made for dispossession of the renter should he refuse to pay and the Japanese consul neglect to act.

By the British and German treaties of November 26, 1883, which were identical, Chemulpo, Fusan, Wonsan, Yang-wha-chin, and Seoul were named open ports, and British and German subjects were granted the privilege of renting or *buying* land in any of the open ports.[12] Hitherto, the purchase of land had not been legalized by treaty, although it had been practised. By an additional protocol it was agreed that the claim to Seoul as an open port would be relinquished if the Chinese Government would give up the right to open commercial establishments in that city.[13] These treaties provided the basis for the projected general foreign settlements to be established in each of the open ports, and in questions of law these treaties had equal force with the later foreign settlement agreements which grew from them.

On April 1, 1884, an agreement was made for the establishment at Chemulpo of a Chinese settlement on ground which was "hilly, low lying land, quite unoccupied."[14] In general, the organization of the settlement was similar to that of the Japanese, which it met on the eastern border, and with the exception that no upset prices for lots were paid, it showed little variation from its predecessor. Rates for lots were the same as those in the Japanese settlement; the official Chinese commercial agent, like the Japanese consul, was the executive head of the settlement, which was administered by a municipal council; and no provision was made for the eviction of renters who defaulted in their payments.

[12] C. T., pp. 132 *ff.* and pp. 172 *ff.* [13] *Ibid.*, p. 148.

[14] "Regulations for the Chinese Settlement at Chemulpo," paragraph II. Chinese settlements were also established at Fusan and Wonsan later, but the author has been unable to secure copies of the agreements. Presumably they were modelled on the Chemulpo agreement.

The exact date for the agreement respecting a general foreign settlement at Chemulpo is not clear, although officially October 3, 1884, has been assigned to it. The original document was undated. Although the agreement was signed by American, British, Chinese, Japanese, and Korean representatives, it was almost entirely the work of one man, Mr. W. G. Aston, at that time British provisional consul general, who had been in Korea for some time before the signing of the British treaty in November, 1883, and who came again on March 17, 1884. Mr. Aston adopted the Kobe foreign settlement negotiations as his model, with somewhat unfortunate results.[15]

The total area comprised within the boundaries of the settlement was 647,107 square meters, divided into four classes of lots known as "A," "B," "C," and "D." There were very few of the first two classes, and all "A" lots, being on the foreshore, were later taken over by the Korean customs. The sea wall and jetty was to be constructed and kept in repair, and the streets and roads were to be laid out and graded at the expense of the Korean Government, which also was to prepare the lots before putting them to auction. The expenses of road repair, street lighting and cleaning, of police protection and other municipal activities, were to be met by the settlement from its own funds. The general foreign settlement nearly surrounded the Japanese settlement, and bordered the Chinese on the north, but its greater portion was located on the hillside well removed from the water.

The upset prices of "A" lots was fixed at ninety dollars, of "B" and "C" lots at six dollars, and of "D" lots, the largest in number, at three dollars per one hundred square meters. The upset prices for all lots in the Japanese settlement amounted only to approximately seventy-six cents per one hundred square meters.[16] The yearly rent of "A" lots was to be twenty dollars, of "B" and "C" lots, six dollars, and "D" lots, two dollars per one hundred square meters. Of this rental thirty cents per one hundred square meters, irrespective of classes of lots, was to be retained by the Korean authorities in lieu of a land tax, and the remainder, together with any balance left over from the proceeds of the land sales, after the costs of preparation of the lots had been deducted, was to belong to the municipal fund. These provisions also contrast markedly with those for the Japanese and Chinese settlements, where the maximum annual rental was about sixty cents per one hundred square meters, and the minimum slightly more than thirty cents.

None but subjects or citizens of treaty Powers whose authorities had signified their acceptance of the agreement were to be allowed to purchase or hold land in the foreign settlement, or to be granted title deeds. The Korean Government, however, might hold lots for the erection of Korean public offices or official residences of Korean functionaries, although these lots were required to contribute to the municipal fund in the same manner as other lots, but no private Korean was to be allowed to hold lots within the limits of

[15] G. C. Foulk, U. S. Chargé, to Bayard, Jan. 29, 1886.

[16] This figure is calculated at the rate of 3200 cash to the dollar.

the settlement. In this respect, settlements in China were much less restricted. In the settlements of both the Shanghai and Hankow type the Chinese were permitted to live within the settlement boundaries.

Title deeds were to be issued and registered by the Korean Government and then transmitted to the purchasers through their authorities; duplicates were to be kept by the government. In contrast with the agreement for the Japanese settlement, no fees were charged for the title deeds. If registration of the title deeds at the various consulates occurred, such registration was purely a matter of convenience between the registrar and his consulate, and had no connection with the Korean Government. Title to the land came only through the government.

The municipal council was to consist of a Korean local official of suitable rank, the consuls of the treaty Powers whose subjects or citizens held land in the settlement, and three registered landholders who should be elected by the other landholders in such manner as the foreign authorities might determine. Obviously, the Korean member of the council with his single vote could have little influence on the proceedings should any difference arise between the settlement and the government. With certain important exceptions, the powers of the municipal council were such as customarily appertain to such a body in an American community. The council was empowered to make by-laws regulating the ordinary civic relations of the members of the community, and to fix a maximum penalty not to exceed twenty-five dollars for the breach thereof. The municipal council was not empowered, however, to set up a court for the trial of offenders against its regulations, and enforcement of the penalties was left to the authorities of the offenders. Since the council was not granted any power to bring suit in a corporate capacity, its legislative powers were practically non-existent. At no time was any court set up in Chemulpo comparable to the municipal court in Shanghai. The residents of the settlement were at all times subject to exactly the same consular courts as those not living within the settlement boundaries.

The title deeds, which were to be issued by the Korean Government, granted the lots in perpetuity to the purchasers, subject to the payment of an annual rent and assessed municipal taxes. No provision was made, however, for the recovery of property should the holder refuse to pay his rent, unless he should absent himself from the country without making proper provision for payment of rents and taxes. In such a case, the Korean Government was empowered to re-enter into possession of the land. After all arrears had been met by sale at auction the government was to pay any balance from the sum thus realized to the authorities of the country of which the defaulter was a subject or citizen.

After a visit to Yang-wha-chin on June 6, 1884, which they found unsatisfactory,[17] the foreign representatives, accompanied by a member of the Foreign Office, located a site for a general foreign settlement at Yong-san,

[17] Allen, *op. cit.*, p. 166.

three miles from Seoul on the Han River. Nothing ever came of this selection, however, because of the preference of all foreigners for Seoul as a place for residence and business.[18]

The fact of the existence of an agreement to that effect did not bring about the immediate organization of a general foreign settlement at Chemulpo, although the Japanese and Chinese settlements were flourishing. By January, 1886, two years after the date assigned to the agreement, some fourteen lots had been taken by Germans, but thus far no title deeds had been issued. Many other foreigners from China and Japan had gone to Chemulpo with a view to purchasing, but had left without having done so, protesting against the terms of the agreement, which they considered extraordinarily exacting: viz., the high upset prices and certain limitations imposed in regard to qualities of building materials to be used.

The Kobe settlement, which was the model for the Chemulpo general foreign settlement, was organized after those at Yokohama and Nagasaki had been well established. Having become wealthy at the latter ports, merchants moved on to Kobe with its higher restrictions. Chemulpo was the first general foreign settlement in Korea, and the merchants settling there in most cases did not possess the necessary capital for profitable trade in China and Japan. Again, firms with large capital were afraid to invest heavily in a new place until trade conditions were stabilized. The agreement appeared to be advantageous to the large British firms in the East in that it preserved to them an opportunity to take up and to absorb the trade of Korea the instant the time should come to do so, while it kept out potential competitors. These facts may have accounted for the vigorous support given the agreement by the British representatives in Peking, Seoul, and Tokio, as well as for its criticism by practically all other interested parties.[19]

So long as no title deeds had been issued for lots in the settlement, there could be no legal electors, and no municipal council could be formed. A provisional council was formed, however, and the few expenses were met by general subscription. The German subjects, through their consul, pressed the Korean Government for title deeds, at the same time vigorously protesting against paying to the government the whole amount of money due on the lots. Their argument was, first, that the government was only entitled to the sum expended in buying and preparing the ground, while the balance belonged to the municipal council; and, second, there being no municipal council and expenses having been defrayed by voluntary contributions, that purchasers of lots should pay only exactly what the government had spent.[20] The financially irresponsible government, having kept no accounts, was unable to say how much it had spent, and promised to accept one-third of the agreed price, and to give in return full receipt. Much of the land had be-

[18] W. W. Rockhill, Chargé, to Bayard, Dec. 17, 1886.

[19] Foulk to Bayard, Jan. 29, 1886. [20] *Ibid.*

longed to the government in the first place, and its expenses had been so small that probably one-third was quite sufficient. After a time the government changed its position and wished to revoke this agreement with the German consul, claiming that it was entitled under the agreement and treaties to retain in full the proceeds of sales until their aggregate should equal the whole amount spent in preparing the whole site. Still, the government was unable to state what that total was, and the revocation did not occur.

The total trade of the port of Chemulpo in 1885, two years after its opening, was $1,042,662.00, and by 1895 it had grown to $6,325,724.00. The government revenues derived from this trade had increased from $79,205.00 in 1885 to $435,509.00 in 1895, or more than four hundred per cent in ten years. In 1885 the three Chemulpo settlements are said to have contained 146 houses, and the Korean town, which in 1882 was made up of only a few miserable fishing huts, totaled 120 houses and a population of 700. Early in 1887 the general foreign settlement itself, however, contained only twelve poorly built frame houses, so far removed from the water front that they were badly suited for business purposes.[21]

The active dissatisfaction of the residents of the general foreign settlement with the terms of the agreement, particularly with the comparatively high prices, the rules fixing types of buildings, and the government's right to reserve lots without auction, as well as the government's dilatory methods and lack of system of accounts, kept the community from organizing until 1888. In 1887 the government agreed to reduce the rent by one-half, while clearly reserving the right to collect the other half at any future time when, in conjunction with the foreign representatives, it should decide such a course was advisable.[22]

Under the auspices of the *kamni* and the representatives of the United States, Germany, Great Britain, China and Japan, the first election to the municipal council was held on December 5, 1888. Each registered landholder was allowed one vote and proxy voting was forbidden. Fifteen ballots were accepted. The three elected members were to serve one, two and three years respectively in the order of the number of votes received, and a new member was to be elected each year, until after the third year each elected member would serve on the council for three years.

The first election and council organization was marred by personal and national jealousies; charges of fraud and intimidation were made; and a group of Germans, led by Mr. Krien, their consul, tried to nullify the actions of the council itself through a program of non-coöperation when they found themselves unable to force their own interpretation of the settlement agreement

[21] Jones, G. H., "Chemulpo," Korean Repository, IV: 374–384. Rockhill to Bayard, March 7, 1887, Foreign Relations, 1887, p. 260. The total population of Chemulpo in 1924 was 41,000.

[22] Rockhill to Bayard, March 31, 1887, Foreign Relations, 1887, p. 265.

upon that body. As problems arose, their interpretations were such as would have greatly minimized the rights of the Korean Government and, in contrast, would have extended the privileges of the foreign settlement as a body independent of that government. Throughout the early days of organization the American minister, Mr. Hugh Dinsmore, and the British consul, Mr. Fulford, appear to have been in practical agreement on almost every point, and likewise, with the support of both the Japanese and Korean representatives, in well-reasoned opposition to the views of the German consul.[23]

Despite the small size of the settlement, it was not unnatural that the attempt to create a unified community from such diverse elements and nationalities should have encountered numerous obstacles. With the passing of time, however, these petty jealousies appeared less frequently, and the municipal council was able to function with comparative smoothness.

From the point of view of the Occidental renters the settlement agreement gave the Korean Government too large a control over the general foreign settlement. The early functioning of the municipal council revealed certain definite defects in the basic regulations for which improvements were proposed, while the settlement members of the council wished the whole agreement abolished and a new one substituted. Although this proposal failed to receive the approval of the foreign representatives at Seoul, its main features are worth noting as an expression of the feeling of the community. By the proposed substitute agreement the Korean Government would have leased in perpetuity to the municipal council the land comprised in the general foreign settlement, and title deeds would have been issued by the municipal council instead of by the government. In other words, the government would have relinquished its direct relationship with the renters, and instead title to property would have been held by the renters from the municipal council and not from the Korean Government. The only direct Korean connection with the settlement would have been through a representative on the municipal council, the chief officer of the royal Korean customs at Chemulpo, who was always a foreigner.[24]

The foreign representatives, who in several instances, notably that of the American minister, served in the significant dual capacity of consular member of the municipal council and member of the Seoul diplomatic corps, did agree to request the Korean Foreign Office to make certain changes in the settlement agreement, the chief of which would have allowed the council to sue and be sued in the name of the secretary, or in its corporate capacity, while exempting individual members from personal responsibility for official

[23] Municipal Council Minutes, I: First Election Meeting, Dec. 5, 1888; First Regular Meeting, March 23, 1889; Fifth Meeting, April 25, 1889.

[24] Suggestions for a New Agreement and Land Regulations for the General Foreign Settlement of Chemulpo, c. 1890.

acts.[25] By interpretation of the existing agreement, the Korean Government, through its local representative, could have conducted any suits which might have arisen, but the municipal council itself had no powers to engage in litigation. The Foreign Office refused, however, to change the regulations in any way.[26]

The right of the Korean Government to reserve lots aroused considerable resentment in the settlement. The agreement stated:

> The Corean Government may, however, hold in their own name lots for the erection of Corean public offices or for the official residences of Corean functionaries; these lots shall be subject to municipal regulations in the same manner as others, and shall contribute to the municipal expenditure in the same proportion as other lots of their class.[27]

The government understood by this clause that it was permitted to make reservation at will, while the council contended that the government must purchase at public auction in the same manner as any other renter.[28] The government desired to build a transport office, and wished to reserve part of the foreshore for this purpose. After considerable discussion, the President of the Foreign Office finally agreed that if the government were given the privilege of reserving this property it never again would ask for more land. The foreign representatives requested that the government return some other lots already held, in exchange for this privilege. At this time, in December, 1891, the government held twelve per cent of the land in the settlement. The government did not grant the request.[29]

This demand was an act of supererogation on the part of the foreign representatives, although doubtless they considered the holding of twelve per cent of the settlement by the government as an evil. There was nothing in the agreement, either expressed or implied, limiting the government to any specified number of lots so long as they were held for official purposes, nor did it define that which might be considered as official. The agreement of the government to reserve no more lots was a mark of its weakness and desire to compromise rather than of the legality of the contentions of the foreign representatives.

The American minister, Augustine Heard, gave adequate denial to the frequent argument that the ownership of the settlement was vested in the community or in the municipal council when he stated to the foreign representatives while presiding at their meeting of July 15, 1891, that inasmuch as the Korean Government issued the title deeds there could be no question as to the ownership of the land.[30]

[25] Changes Proposed by the Foreign Representatives, Dec. 31, 1890. Minutes of the Foreign Representatives, Jan. 10, 1890.

[26] Augustine Heard to Department of State, No. 43 and No. 44.

[27] Section V, paragraph V, C. T., p. 310.

[28] Municipal Council Minutes, I: Extraordinary Meeting, Nov. 11, 1891.

[29] Foreign Representatives' Minutes, Dec. 15, 1891.

[30] *Ibid.*, July 15, 1891.

For the most part, the three settlements appear to have maintained amicable relations. The general foreign settlement hired both Chinese and Japanese police and scavengers, and during the Sino-Japanese war took care to police, light, and scavenge the Chinese settlement for reasons of public health and safety. There was some trouble of a minor nature with armed Japanese soldiers who walked at will through the settlement, and likewise there was some friction with the customs, which was manned by foreigners, but on the whole the settlement was free from disorder. A municipal building was erected for the work of the council, and the settlement commenced to take on the atmosphere of a prosperous community.

On October 1, 1897, an agreement to establish general foreign settlements at Chinnampo, a port in the northwest, and at Mokpo, in the southwest, was signed by the President of the Korean Foreign Office and the representatives of Japan, the United States, Russia, France, Great Britain, and Germany. France and Russia had previously joined in the Chemulpo foreign settlement agreement. The Chinnampo settlement occupied an area of 776,460 square meters, and the Mokpo of 966,076 square meters. With a background of several years' experience with the Chemulpo settlement, the negotiators were able to make the new regulations more satisfactory than those which preceded them. They were prepared by J. McLeavy Brown, the commissioner of customs, and corrected and agreed upon by the foreign representatives.[31] Although in general plan the regulations followed closely those for the first general foreign settlement, there were certain definite differences. The municipal councils were made corporations with the right to sue and be sued; they were made the agents of the government in the collection of rents, with adequate powers to enforce payment; upset prices and rents were made less than at Chemulpo; control of the foreshore was reserved to the government, a necessary provision for the proper functioning of the customs; and all Koreans, even officials, were excluded from residence in the settlements. By its agreement to such a humiliating provision, the Korean Government exhibited its extreme weakness as well as ignorance. A court was set up composed of the Korean Minister of Foreign Affairs and all the foreign representatives at Seoul, in which a majority decision was to be final. It does not appear that this court was ever called upon to exercise its functions.[32]

As has been stated, Seoul was open on the basis of Chinese residence; should the Chinese have agreed to withdraw, the subjects of other Powers were bound to do likewise. One serious attempt was made to cause this withdrawal in 1886 but the strong opposition of the representatives of the treaty powers, as well as the undoubted unwillingness of the Chinese mer-

[31] H. N. Allen to Sherman, No. 35, Nov. 13, 1897.

[32] Regulations for the Foreign Settlements at Chinnampo and Mokpo, Oct. 16, 1897. The two settlements were opened to trade on October 1, 1897; J. M. B. Sill to Min Chong Mok, Minister of Foreign Affairs, July 6, 1897.

chants to remove, caused its failure. No doubt the extension of treaty limits of the port of Chemulpo to a radius of one hundred *li* after 1884 by the Japanese convention of 1882 would have warranted the treaty Powers in refusing to countenance a withdrawal should the Chinese have done so.

No provision for a general foreign settlement was made in Seoul, and the foreigners bought land in all parts of the city, the Japanese tending to concentrate in one, the Chinese in another, and the Occidentals in two or three districts. The so-called legation quarter in *Chong-dong* was the chief place of settlement for western foreigners. The activity of foreigners, especially Japanese, in buying desirable locations all over the city, and the freedom of foreigners from accountability to the native police and courts, aroused the opposition of the Korean people and government. On July 3, 1895, the Korean Minister for Foreign Affairs, Kim Yun Sik, opened informal negotiations with the foreign representatives for the establishment of a foreign settlement or settlements in Seoul in accordance with the treaties.[33] His suggestion was that two or three areas should be set aside for general foreign settlements, and that within the city walls outside of these areas no foreigners should be allowed to buy or rent land or houses, but that outside of the walls and within the ten *li* treaty area they should be free to buy or rent at will. In view of the rapidity with which property within the city walls was passing into the hands of foreigners, the alarm felt by the Korean Government was most natural, and this suggestion was not unreasonable. It would have necessitated treaty revision, however, to put it into effect.[34] The complete demoralization of the government after the murder of the queen in October, 1895, and the subsequent flight of the king to the Russian legation, the tale of which is too well known to need repetition here, caused the complete collapse of these negotiations, and no foreign settlement was ever established in Seoul. Numerous unsuccessful attempts were made to restrict the freedom of foreigners in the purchase of land in the capital, but the story of this activity is not pertinent to the present study.

The Japanese settlement at Fusan occupied the land most suitable for a port city. The first comers among the other foreigners individually purchased the best of the remaining available sites, and when the representatives of the treaty Powers were ready to consider the organization of a general foreign settlement at Fusan they found the problem of location very difficult of solution, especially since those persons presumably chiefly interested in forming such a municipality had already occupied land and houses which they would not willingly have given up to go into a new foreign settlement. After careful investigation the foreign representatives decided that a large island, known as Deer Island, opposite the Japanese settle-

[33] Kim Yun Sik to J. M. B. Sill, July 3, 1895.

[34] Sill to Kim Yun Sik, July 9; Kim Yun Sik to Sill, Aug. 9; Kim Yun Sik to Sill, Sept. 3, 1895.

ment on the mainland, was the most suitable location for a general foreign settlement. In 1894, at the request of the British, Russian, and American representatives, the Korean Government laid out the desired area and enclosed about fifty acres with boundary stones. The murder of the queen and consequent disorder prevented the opening of this tract.

The Japanese had coaling stations at Wonsan, Fusan, and Chemulpo, and some time before 1897 the Russian representative at Seoul asked for a site for a Russian coaling station at Fusan, a request quite proper from one point of view, but one which could not be viewed without serious alarm by the Japanese Government because of the proximity of Fusan to the Japanese coast. In 1897 the Russian representative in Seoul, Alexis de Speyer, embarked on an ambitious and meteoric program for the extension of Russian influence in the peninsula at the expense of Japan. One of the items in his plan concerned Fusan. He persuaded the Korean Government to grant him for the Russian coaling base the area on Deer Island previously selected for a foreign settlement, and in fact the only suitable site for such a settlement. Separately, the British, Japanese, German and American representatives objected to the Korean Government against the site being given to the Russians. The Korean Foreign Minister agreed to respect the protest,[35] but De Speyer insisted on the validity of his grant, and for the time the question remained open.[36]

De Speyer was responsible for a somewhat similar controversy at Chinnampo. Under the clause of the regulations which permitted a government to acquire a suitable lot or lots for a consulate on paying the upset price only, De Speyer reserved for the Russian Government an area of 280,000 square meters out of a total settlement dry land area of 460,000 square meters, alleging the needs for a consulate, hospital, and coaling station. The British, German, and Japanese representatives strongly opposed De Speyer's action. Finally, the Japanese Foreign Minister, Baron Nishi, asked De Speyer as a personal favor to reduce his demand for land, and on instructions from Saint Petersburg the latter agreed to do so. Just outside of and adjoining the settlement, however, he bought land in area greater than the settlement itself, while in Mokpo he attempted to purchase a whole island in the harbor. There could be no legal objection to these purchases since they were within the ten *li* treaty limits. It had been the general impression that no consular site in any of these ports would exceed 40,000 square meters, although the Japanese had reserved about 80,000 square meters at both Chinnampo and Mokpo.[37]

In his attempts to secure coaling stations at Fusan and the other ports, De Speyer was so peremptory and harsh in his actions that he completely alienated Korean official opinion, and aroused strong native opposition to his

[35] Allen to Sherman, No. 8, Oct. 1, 1897. [36] Same to same, No. 16, Oct. 8, 1897.
[37] Allen to Sec. of State, No. 81, March 7, 1898.

program. At one time it seemed that serious conflict between Japan and Russia was bound to take place, but the good offices of Baron Rosen, Russian minister to Japan, coupled with the pacific intentions of the Russian Government at that time, prevailed to lessen the tension. De Speyer was recalled in March, 1898, and his whole program was allowed to collapse. Russia was too much occupied in Manchuria to let the activities of her representative in Korea draw her into a war with Japan at that date, especially in the face of British opposition.[38] As a result of this change in the political situation, at the suggestion of Dr. Allen, the American minister, the question of the proposed Russian coaling station on Deer Island at Fusan was settled by the allotment of 900,000 square meters, including the proposed Russian site, for a general foreign settlement which would include the whole end of the island and give ample room within its limits for the coaling station as well as for the other interests.[39] Despite this settlement of the vexing question, however, no general foreign settlement was ever organized at Fusan, and Occidental foreigners continued to live in the places most convenient for them outside of the Japanese and Chinese settlements.

In the spring of 1898 the Korean Government decided to open four more ports: Songchin on the northeast coast, Masampo and Kunsan on the southwest coast, and Pyeng Yang, the commercial capital of the north and the second city of the kingdom. It was understood that the government was moved to this action by the belief that as open ports these cities would be less liable to seizure by a hostile Power than they would be if no third Power had an interest in them.[40] It was the intention of the Korean Government to establish general foreign settlements at each of these four cities. There were in Pyeng Yang numerous Japanese merchants who had purchased land outright, and a few American missionaries who had bought it in the names of their native assistants. Following the announcement in June, 1898, of the prospective opening of these four ports, the Americans openly took title to their property. The Foreign Office informed the American minister that Americans were not allowed to build houses in Pyeng Yang since no regulations had been drawn up nor had settlement boundaries been fixed. Dr. Allen took the position that Pyeng Yang was now in the same class as Seoul, Fusan, and Wonsan, where there were no general settlements, and that as long as foreigners lived within ten *li* of the city they were within their rights in buying property. Under pressure from the foreign representatives, the Korean Government finally set May 1, 1899, as the day for the opening of the four ports to residence and trade, and announced that the regulations adopted for Mokpo and Chinnampo would be put in force in the new settlements.[41]

[38] Allen to Sec. of State, No. 88, March 16; No. 90, March 22, 1898.

[39] Same to same, No. 111, June 3, 1898.

[40] *Ibid.*, No. 112, June 3, 1898.

[41] Pak Chai Soon, Min. For. Affairs, to Allen, No. 19, March 1; No. 27, March 21, 1899; Allen to Hay, No. 185, March 22, 1899.

The decree proclaiming the opening of Pyeng Yang had used the Chinese characters for Pyeng Yang district rather than for the city of Pyeng Yang, and had stated that later a place for trade would be selected and regulations made. On April 15, 1899, the government announced the opening of an insignificant village, Suk Ho-jung, fifteen miles from the city but still in the district, alleging the necessity of preserving the city proper, the greater part of which was the property of the Imperial Household Department, from foreign residence. The government stated at the same time that at no time had it been its intention to select the city itself as the place for a foreign settlement.[42] The American *chargé*, William F. Sands, refused to consider any place but Pyeng Yang city itself as the place for the foreign settlement, and he was supported by his government. He went so far as to inform his fellow nationals that from May 1, 1899, Pyeng Yang was open to residence and he commenced to register their deeds in the consulate.[43] He treated the attempt of the Koreans to exclude foreigners from residence in the city as an act of bad faith. The evidence for the legality of the Korean case seems sufficient, but in this, as in almost every other instance of conflict of opinion between the Korean Government and foreign representatives, the views of the latter prevailed.

On June 23 the government offered a place named Yung Chi-kio, close to the city but still outside and so objectionable.[44] Both Yung Chi-kio and Suk Ho-jung were on the great East River which flows past Pyeng Yang to the sea. On July 20 the government offered to open a part of the city which had no water front, on the understanding that foreigners might not live in any other section of Pyeng Yang.[45] The foreign representatives refused longer to acquiesce in that which they professed to be a denial of their rights, and on November 16, 1899, in separate notes they informed the Korean Government that they considered Pyeng Yang an open port and that they would protect such of their people as chose to go there for residence or trade.[46] The Korean Government could only submit to this concerted action. Naturally, however, a foreign settlement was never organized at Pyeng Yang.

The ports of Kunsan, Masampo, and Songchin were opened on May 1, 1899, and on June 2, the same parties subscribing to those for Chinnampo and Mokpo issued regulations for general foreign settlements at the new ports. The Kunsan settlement was to have an area of 572,000 square meters, Masampo, of 540,852 square meters, and Songchin of 580,000 square meters. At Kunsan and Songchin only single foreign settlements

[42] Pak Chai Soon to Wm. F. Sands, No. 45, May 16; Sands to Pak, No. 172 F. O., May 10, 1899; Pak to Allen, No. 71, Dec. 27; Pak to Sands, No. 56, Aug. 18, 1899.

[43] Sands to Pak, No. 173 F. O., May 24, and No. 187 F. O., Aug. 26, 1899; A. A. Adee to Sands, No. 136, Sept. 12, 1899.

[44] Pak to Sands, No. 51, June 23, 1899.

[45] *Ibid.*, No. 54, July 20, 1899.

[46] J. N. Jordan, British Chargé, to Pak, Nov. 16 (?); Allen to Pak, No. 197 F. O., Nov. 16; Allen to Sec. of State, No. 213, Nov. 17, 1899.

were organized instead of several as at Chemulpo. The new regulations were identical with those issued for Chinnampo and Mokpo.[47]

In the spring of 1899 the Russian representative, Pavlow, selected a site of ground on the foreshore at Masampo, and told the local magistrate to reserve it for him. Shortly thereafter, while he was in Moscow on leave, a Japanese bought the same land from its Korean owners and the magistrate issued the deed for it. Masampo has a very fine harbor, one of the finest in the world, and is but a few hours steaming from Shimoneseki. It has an excellent anchorage for warships, and a large island at the entrance which if properly fortified could make the port impregnable.[48] Naturally, on his return Pavlow made strenuous objections against the Japanese action, but they had been too clever for him. The question was settled by the allotment of an area of land of between 800,000 and 900,000 square meters, larger than the whole foreign settlement, to Russia as an exclusive settlement. This area included the whole coastline of a fine bay, and thereby debarred the subjects of other nations from buying land freely within the ten *li* radius of the general foreign settlement. To offset the Russian settlement the Japanese skillfully secured one for themselves. Private Japanese bought all the land desired, which later was taken over by the Japanese Government, which secured an agreement assigning the whole tract as a special Japanese settlement. The area was about 450 acres. No one could make any serious objection, because the land was purchased by private Japanese outside of the general foreign settlement but within the ten *li* limit. Citizens of any other treaty Power could have done the same thing.[49]

During the passing years numerous political changes were occurring in the Korean state, and in 1910 Japan annexed the peninsula as an integral part of the Japanese Empire. With the exception of Chemulpo, none of the foreign settlements had been administered according to the agreements. At Chinnampo and Masampo the foreign settlement administration had been conducted by municipal councils consisting of the local prefect, the Russian or Chinese consul, and a representative of the Japanese leaseholders. At Mokpo, Kunsan, and Songchin the respective municipal councils had consisted of the local prefect and a representative of the Japanese leaseholders, since no other foreigners lived there. The exclusive Chinese settlements at Fusan, Wonsan, and Chemulpo had been administered chiefly by the Chinese consuls at those ports; while the exclusive Japanese settlements were under the supervision of a Japanese resident (successor to the consul) and municipal business had been conducted by a council chosen from the Japanese leaseholders.

[47] Regulations for the Foreign Settlements at Kunsan, Masampo, and Songchin, June 2, 1899. Copy issued by Foreign Office, London, Aug. 1, 1899.

[48] Allen to Sec. of State, No. 235, March 19, 1900; "The Harbour of Masampho," Kobe Chronicle, April 9, 1900.

[49] Allen to Sec. of State, No. 245, April 21, 1900.

Following the annexation, the new governor general issued a decree on August 29, 1910, declaring that, with the exception of police power, the municipal administration of the general foreign settlements was to be retained until other arrangements could be made.[50]

By the end of 1912 the six general foreign settlements, comprising a total area of 4,082,495 square meters, had leased lots to the extent of 2,573,939 square meters. The total annual rent paid by the lots was ¥94,596.94. Americans held a total of only ten lots, seven at Chemulpo, two at Mokpo, and one at Chinnampo, and paid a combined rent of only ¥353.92.[51]

The foreign consuls and the chief of the Bureau of Foreign Affairs held discussions at Seoul at intervals from February 17 to April 14, 1913, to consider Japanese proposals for the abolition of the general foreign settlements. The Chinese settlements were dealt with separately. Because the Chemulpo general foreign settlement was free from debt and had a good cash balance, while the Japanese settlement in the same city had a comparatively large public debt, the sum of ¥20,000.00, or such part thereof as was deemed necessary, was set aside from the property of the general foreign settlement for the maintenance in the various foreign settlements of existing foreign cemeteries, which were to be in charge of the local foreign residents; and foreigners were exempted from school taxes. It was agreed further that holders of leases in perpetuity in the foreign settlements were to be allowed the option of converting their leaseholds into actual ownership on the same basis as that of Japanese subjects in Korea, and that conversions and registrations were to be made without fees or taxes of any kind. In case the option to convert leases in perpetuity into ownership in *fee simple* was not taken all rights created by the leases in perpetuity were to continue to be respected, and only in case the national and local taxes should exceed the annual ground rent would any assessments be leviable on the leaseholds, and then only to the extent of the difference.

The preliminary protocol was signed on April 14, 1913, by the representatives of Japan, the United States, Germany, Belgium, Russia, Great Britain, France, and Italy. The protocol was ratified by an exchange of notes and telegrams between the Japanese Foreign Office and the signatory Powers during the period extending from October, 1913, to March, 1914. The settlements were finally merged with their respective municipalities (prefectures) on April 1, 1914, in accordance with the provisions of ordinance No. 7, entitled "Prefectural Ordinance," which was promulgated by the Governor General of Chosen on October 30, 1913, and subsequently, on March 31, 1914, made operative from the above date.

[50] Annual Report on Reforms and Progress in Chosen (1910–1911), Keijo, Dec. 1911, pp. 32*f*.

[51] Statistics relating to the General Foreign Settlements in Chosen, Table IV: e, Government General, Keijo, 1912.

"ATTACHMENT TO THE PRINCIPLES OF THE CONSTITUTION" AS JUDICIALLY CONSTRUED IN CERTAIN NATURALIZATION CASES IN THE UNITED STATES

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The recent decision of the Supreme Court of the United States that Madam Rosika Schwimmer, avowed "uncompromising pacifist," is not eligible to become a citizen of the United States[1] has focused attention upon our naturalization laws and their judicial construction. Especial interest has been aroused in those provisions which prescribe the qualifications concerning the applicant's attachment to the principles of the Constitution of the United States.[2]

Under what conditions is a petitioner for naturalization "attached to the principles of the Constitution"? May beliefs, views or opinions disqualify an applicant, or must there be conduct or behavior—overt acts? In what manner and to what extent must an applicant be willing to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic"? May the applicant be required to bear arms in defense of the United States? May the good faith with which he supposedly renounced and abjured under oath "absolutely and forever" all the allegiance and fidelity he owed to his country of origin be successfully questioned subsequent to his naturalization because of alleged disloyal remarks made or acts committed many years thereafter?

Nearly a quarter of a million candidates for final naturalization apply annually to more than two thousand courts in the United States. The test of the applicant's fitness is of great concern to alien and citizen alike. Through an examination of the laws governing the subject and of the reported opinions of the naturalization courts we may hope to find answers to these very important questions which, though primarily of municipal concern, may on occasion result in international complications. But because the subject is so broad in scope, we can expect to cover a part only of it,

[1] The United States of America, Petitioner, *v.* Rosika Schwimmer, 49 S. Ct. 448 [Advance Sheets], opinion May 27, 1929; on writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. See text of this opinion in this Journal, Vol. 23, No. 3, pp. 652–658 (July, 1929); also in The United States Daily, Washington, D. C., May 28, 1929, Vol. IV, No. 74, pp. 4 and 12.

[2] For a detailed statement of this case, see current note, "Supreme Court Holds Madam Schwimmer, Pacifist, Ineligible to Naturalization," by the writer, in this Journal, Vol. 23, No. 3 (July, 1929), pp. 626–632.

due to the usual limitations as to space. For that reason, we shall confine ourselves here to a consideration of those cases bearing particularly upon the meaning of the oath of allegiance, especially those dealing with loyalty to the United States and the obligation to defend it against its enemies.

Pertinent portions of the naturalization statutes governing substantially all of the cases to which reference will be made are quoted below:

> It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.[3]
>
> He [the applicant for naturalization] shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.[4]

[3] Subdiv. 4, Sec. 4, Act of June 29, 1906, 34 Stat. 598; U. S. C. t. 8, Sec. 382. This subdivision has been amended by Sec. 6 (b), Act of March 2, 1929, 45 Stat. 1513–1514; U. S. C. Sup. III, t. 8, Sec. 382, effective July 1, 1929. See text of the latter statute in Supplement to this JOURNAL, Vol. 23, No. 2 (April, 1929), pp. 115–116.

[4] Subdiv. 3, Sec. 4, Act of June 29, 1906, 34 Stat. 597–598; U. S. C. t. 8, Sec. 381.

The following provisions refer specifically to the applicant's "beliefs": ". . . no person who *disbelieves* in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such *disbelief* in or opposition to organized government, . . . shall be naturalized or be made a citizen of the United States." (Italics supplied.) Sec. 7, Act of 1906, *supra*, 34 Stat. 598–599; U. S. C. t. 8, Sec. 364.

"The petition [for naturalization] shall set forth that he [the petitioner] is not a *disbeliever* in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching *disbelief* in or opposed to organized government, a polygamist or *believer* in the practice of polygamy, . . ." (Italics supplied.) Par. 2, Subdiv. 2, Sec. 4, Act of 1906, *supra*, 34 Stat. 597; U. S. C. t. 8, Sec. 379.

The statute requires the sworn declaration of intention to become a citizen to include the allegations, "I am not an anarchist; I am not a polygamist nor a *believer* in the practice of polygamy; . . ." and the sworn petition for naturalization to include the allegations, "I am not a *disbeliever* in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching *disbelief* in organized government. I am not a polygamist nor a *believer* in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United

The oath of allegiance referred to is as follows:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ..... of which (whom) I have heretofore been a citizen (subject); that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.

As the foregoing statutory provisions do not define the expressions, "attached," "principles of the Constitution," "well disposed," "support and defend," and "true faith and allegiance," the courts have been under the necessity of determining their meaning.[5]

States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ———, of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States." (Italics supplied.) Sec. 27, Act of 1906, *supra*, 34 Stat. 604; U. S. C. t. 8, Sec. 409.

[5] The nature of this article, which attempts to present a cross-section of prevailing judicial opinion, requires the frequent use of quoted excerpts from the reported cases in order that the precise attitude of the courts may be understood. The decisions include those reported up to August 1, 1929. While the Schwimmer opinion, both because of its source and reasoning, is outstanding, it was preceded by a considerable number of other reported cases involving some phase of the question here under discussion.

Petitions for naturalization have been denied (usually without reported opinions) on grounds growing out of participation by the United States in the World War, as follows:

Year	*Ground of denial of petition for naturalization*	*Number*
1920	Pleaded alienage to avoid military service	245
"	Not attached to Constitution	800
1921	Claimed exemption from military service	1,736
1922	Claimed exemption from military service	10,288
1923	Unfavorable draft status	6,162
"	Disloyalty	288
"	Slackers	675
1924	Draft evasion, disloyalty, slackers	5,001
1925	Unfavorable draft status	3,261
"	Disloyalty	38
1926	Unfavorable draft status	1,569
"	Disloyalty	26
1927	Unfavorable draft status	577
"	Disloyalty	5
1928	Unfavorable draft status	399
"	Disloyalty	77
	Total	31,147

Above data from annual reports, Commissioner of Naturalization (fiscal years ended June 30), Washington, Government Printing Office; tables as follows: 1920, No. 2, note, p. 6; 1921, No. 6, note 2, p. 6; 1922, No. 6, notes 1 to 4, inclusive, p. 7; 1923, No. 12, notes 1 to 10, inclusive, p. 10; 1924, No. 6, p. 40; 1925, No. 7, p. 43; 1926, No. 8, p. 40; 1927, No. 8, p. 36; 1928, No. 9, p. 29. Figures for year 1929 are not yet available. Such petitions as may have been denied upon similar grounds during the fiscal years 1917, 1918 and 1919

Considered from the point of view of the different groups of applicants involved, the reported cases which have been examined lend themselves to the following somewhat rough classification:

I. Conscientious objectors.
II. Draftees who claimed Exemption from Military Service because of Alienage.
III. Naturalized Citizens whose Loyalty was questioned subsequent to their Acquisition of Citizenship.

These subjects will be discussed in the order above shown.

I. Conscientious Objectors

During the participation by the United States in the World War, certain ministers of religion and students preparing for the ministry in theological or divinity schools were exempted from the draft by the Selective Service Law. Believing members of well-recognized religious sects or organizations whose creed or principles forbade their members to participate in war, while not required or compelled to serve in the forces provided for,[6] were not exempted from noncombatant service in the Medical Corps, Quartermaster Corps or in engineer service.[7] But the so-called "conscientious objector" was not recognized either in the Selective Service Law or regulations.[8] Legislation liberalizing the requirements for naturalization of alien veterans of the World War[9] contained provisions excluding from its benefits "(1) any individual at any time during such period [April 6, 1917, to November 11, 1918, inclusive] or thereafter separated from such forces [of the United States] under other than honorable conditions, (2) any conscientious ob-

may have been reported in those years under one of three other headings in the tables: "Immoral character," "Declaration of intention invalid," or "Miscellaneous."

[6] Sec. 4, Selective Service Act of May 18, 1917; 40 Stat. 76, 78, provided in part: "That the Vice President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military or naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; . . ."

[7] Ch. III (VII), Noncombatants, par. 2, pp. 58–62, Second Report, Provost Marshal General, Washington, Government Printing Office (1919).

[8] *Ibid.*, p. 58.

[9] Secs. 1 and 7, Act of May 26, 1926, 44 Stat. 654–655; U. S. C. Sup. III, t. 8, Secs. 241 and 392a. This act expired by its terms at the end of two years. The substance of it was reenacted by Sec. 3, Act of March 4, 1929, 45 Stat. 1546; U. S. C. Sup. III, t. 8, Sec. 392a.

jector who performed no military duty whatever or refused to wear the uniform, or (3) any alien at any time during such period or thereafter discharged from the military or naval forces on account of his alienage."

May a male alien be naturalized though he "has conscientious scruples against the shedding of human blood, even in warfare," and, if admitted to citizenship, "would not be willing to serve in the field in the military forces of the United States, if called upon to do so"? This question has been judicially answered. The United States, as a body politic, has the unquestioned right to determine for itself the terms and conditions under which an alien may be admitted to membership—that is, citizenship—in that body. Citizenship is not merely a privilege but an obligation as well. In return for the rights of citizenship certain duties are imposed upon the naturalized alien, and an oath exacted that he will perform them. Those duties prescribed by Congress in plain and unambiguous language—"to support and defend the Constitution and laws of the United States . . . and bear true faith and allegiance to the same"—may not be lessened or diminished by the courts. The court further held:[10]

> The oath to support and defend the Constitution of the United States embraces every method of support and defense which the Government may lawfully prescribe. That it may prescribe support and defense by active military service is obvious from the constitutional provisions. . . .
>
> As it is manifest that the petitioner can not, without reservations, mental or otherwise, take the oath of allegiance, such oath should not be administered or accepted.
>
> Hence the prayer of his petition must be denied, and the petition dismissed.

Another male conscientious objector, a native of Hungary, had made his declaration of intention to become a citizen in 1916. On August 10, 1917, he appeared before the draft board at Toledo, Ohio, and filed an affidavit of which the following is a part:

> I, Ferdinand D——, . . . hereby respectfully claim discharge from selective draft on the following ground: That I am bound by the law of my conscience to refuse to bear arms or to participate in war, and that I will loyally do anything with my hands or my brain for this country, but will not become a soldier, nor set out to kill or injure my fellow men, and especially in this war, in which two of my brothers have been compelled to fight in the armies of the Central Powers.

In the naturalization court he asserted that his position respecting the bearing of arms was still the same as at the time of the draft. The court declared:[11]

> . . . The Constitution recognizes the office of force, through war, in the preservation of our institutions, and it is fundamental to any

[10] *In re* Roeper (D. C. Dela., Morris, DJ., 1921), 274 Fed. 490, 491.

[11] *In re* D—— (D. C. N. D. Ohio, W. D., Killits, DJ., 1923), 290 Fed. 863, 864.

> democracy that social and political obligations should be universal. By the Act of June 3, 1916, c. 134, §57 . . . every able-bodied male citizen of the United States and all other able-bodied males who have declared their intention to become a citizen of the United States, who are between the ages of 18 and 45, are members of the unorganized militia, required by law to bear arms when necessary. This legislation obligated the applicant as a declarant. He repudiated it when he told this court that he stood by his demand for exemption as a "conscientious objector."
>
> By the Naturalization Act . . . an applicant, as a condition for admission to citizenship, must declare on oath, among other things, that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same. We are unable to see how an applicant, who conscientiously objects to bearing arms in his country's defense, can take this oath without reservations, and we are unwilling to accept an oath that is subject to any reservation whatever. The import of the oath includes, very clearly, an obligation on the part of the taker that he will accept responsibility for every law, including that referred to respecting the militia. It includes by implication also a responsibility to respond to every call which the legislative wisdom of the country shall deem requisite to the defense of the country. In our judgment, the applicant does not measure up to the full essentials of American citizenship, and his application is therefore denied.
>
> Without any intention to reflect upon the quality of the profession of conscientious objector, we feel that it is enough that the country must endure the native-born of that persuasion whose citizenship is a birthright, without extending the number by the favor of naturalization laws.

But there appears to be a limitation on the power of a court to debar. A State court, after finding "that petitioner will not bear arms in defense of the United States," made and entered the following judgment: "Said petition is hereby denied with prejudice, and (petitioner is) forever debarred from citizenship and declaration held invalid." [12] On *certiorari*, the petitioner claimed that the lower court had exceeded its jurisdiction. The Supreme Court of Montana adopted the Court Commissioner's opinion that "A court is certainly not transcending its discretionary power when it refuses to admit to citizenship an alien who affirms that he will not support the government, . . ." [13] But the judgment was ordered modified by striking out the protested clause, namely, "forever debarred from citizenship" as not being authorized by any law, State or Federal, and clearly in excess of the lower court's jurisdiction.[14]

[12] State *ex rel.* Weisz *v.* District Court of 16th Judicial Dist. for Garfield County *et al.* (Supreme, Poorman, CC., 1921), 61 Mont. 427, 431; 202 Pac. 387.

[13] *Ibid.*, p. 433.

[14] For the provision forever debarring from citizenship certain alien declarants during the World War, see Ch. XII, Sec. 4, Act of July 9, 1918, 40 Stat. 845, 885; U. S. C. t. 8, Sec. 366: ". . . That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to mili-

Madam Schwimmer, a native of Hungary, in seeking naturalization declared that she was "an uncompromising pacifist," [15] who had "no nationalistic feeling," "no sense of nationalism," and "only a cosmic consciousness of belonging to the human family." She disapproved of the government asking her to fight personally with fists or a gun. She was not only unwilling under present conditions to bear arms as a citizen in defense of this country, but would not do so even though American women should be compelled to bear arms. With her it was a matter of conscience. In other ways she was ready "to follow the law and do everything that the law compels American citizens to do." She had stated her willingness to take the oath of allegiance. Her application for naturalization was denied by the District Court. The grounds for this adverse action were that she had been found to be "not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," and "unable to take the oath of allegiance prescribed by the Naturalization Law without a mental reservation." The Circuit Court of Appeals reversed the judgment, holding that "mere views are not, by the statute, made a ground for denying a petition," and that the views of the applicant relied upon to support the denial of her application "have no substantial relation to the inquiry authorized by the [naturalization] statute. They were immaterial to that inquiry and do not furnish sufficient basis for the decree." [16]

The majority opinion of the Supreme Court, handed down by Mr. Justice Butler, declares that naturalized and native-born citizens alike owe allegiance to the government which owes them protection; that these are reciprocal obligations, each a consideration for the other; and that "the duty of citizens by force of arms to defend our Government against all enemies whenever necessity arises is a fundamental principle of the Constitution." While a "pacifist," in the general sense of the word is one who seeks to maintain peace and abolish war, it is also used and understood to mean "one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal." The influence of conscientious objectors against the use of military force in defense of the principles of our government was regarded as apt to

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tary service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States." This provision was duplicated in Sec. 1, Act of August 31, 1918, 40 Stat. 955. The procedure under the quoted provision is set forth in Selective Service Regulations, 2nd ed., September 16, 1918, Washington, Government Printing Office (1918), Sec. 79, Rule XII (1), p. 55; Sec. 117½, pp. 80–82; and Secs. 325–326, pp. 279–280.

[15] The United States of America, Petitioner, *v.* Rosika Schwimmer, *supra.*

[16] Schwimmer *v.* United States (C. C. A., 7th Cir., Anderson and Alschuler, CJJ., and Baltzell, DJ., 1928), 27 F. (2d) 742.

be "more detrimental than their mere refusal to bear arms," and the fact that by reason of sex, age or other cause they might be unfit to serve, "does not lessen their purpose or power to influence others." Opinions and beliefs as well as behavior of an applicant for naturalization concerning a possible disposition to hinder citizens in their duty to bear arms are proper subjects of inquiry, are of "vital importance," and the views of applicants for naturalization in respect of such matters "may not be disregarded." One who is without any sense of nationalism "is not well bound or held by the ties of affection to any nation or government."

Finally, the majority declare that the language used by Madam Schwimmer to describe her attitude in respect of the principles of the Constitution was vague and ambiguous. She had failed to overcome the burden upon her "to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act." The Circuit Court of Appeals was reversed and the denial of citizenship affirmed.

Mr. Justice Holmes, dissenting, looked upon the applicant as a woman of superior character and intelligence, "obviously more than ordinarily desirable as a citizen of the United States." As to her extreme pacifistic opinions, the applicant appeared, in the justice's view, to hold none of the now-dreaded creeds, to thoroughly believe in organized government, and to prefer this government to any other. The learned justice could hardly see how the adequacy of her oath of allegiance could be affected by her refusal to bear arms to defend the Constitution, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to. Belief that the Constitution can be improved does not show lack of attachment to its principles. The justice had no fear that in the event of war the applicant would exert activities calculated to obstruct the recruiting and enlistment service of the United States. While he did not share her optimism in believing that war would disappear and mankind would unite in peaceful leagues, he regarded her anticipations in this respect as a better argument for her naturalization than any he could offer. And though some of her answers might arouse popular prejudice, one of the most important principles of the Constitution that imperatively calls for attachment is the principle of free thought, particularly for that which we hate. Mr. Justice Brandeis concurred with Mr. Justice Holmes, while Mr. Justice Sanford, in his dissent, agreed in substance with the views of the Circuit Court of Appeals.

Two days after the Supreme Court decided the Schwimmer case, the following bill[17] was introduced in the House of Representatives:

[17] H. R. 3547, 70th Cong., 1st Sess., introduced May 29, 1929, by Mr. Griffin of New York, and referred to the Committee on Immigration and Naturalization.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourth subdivision of section 4 of the Act entitled "An Act to provide for a uniform rule for the naturalization of aliens throughout the United States, and establishing the Bureau of Naturalization," approved June 29, 1906, as amended (March 2, 1929, Public, Numbered 962, Seventieth Congress, section 6 (b)), is amended by adding at the end of the first paragraph thereof the following new sentence: "*Except that no person mentally, morally, and otherwise qualified shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes.*"

(Italics supplied in the portion within quotation marks.)

This was shortly followed by a Senate bill:[18]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for a uniform rule for the naturalization of aliens throughout the United States, and establishing a Bureau of Naturalization," approved June 29, 1906, as amended, be amended by striking out subsection 3 of section 4 thereof and substituting the following:

"Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty, and particularly by name to the prince, potentate, State, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same; *that when called upon he will bear arms in defense of the United States, its Constitution and laws; and that he will, without reservation, aid and encourage the United States against all enemies, foreign and domestic.*"

(Italics supplied in the portion within quotation marks.)

The action which Congress may take upon these two measures will be awaited with general interest.

II. Draftees who claimed Exemption from Military Service because of Alienage

The question whether applicants for naturalization have been attached to the principles of the Constitution has arisen most often in cases where exemption from military service or deferred classification on account of alienage was claimed during the World War.[19] These cases included both de-

[18] S. 1506, 70th Cong., 1st Sess., introduced June 14, 1929, by Mr. Steck, of Iowa, and referred to the Committee on Immigration.

[19] The Selective Service Act provided in part as follows: ". . . Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. . . ." Sec. 2, Act of May 18, 1917; 40 Stat. 76, 77–78.

clarant and nondeclarant aliens[20] at the time of the claim of exemption, and citizens or subjects of friendly, neutral and enemy countries. Applications of such persons for citizenship have generally been denied because the courts believed such claim was evidence of lack of attachment to the Constitution. There has been some conflict in the attitude of the various naturalization courts upon the subject as is disclosed by the cases examined. While little, if any, distinction has been made by some of the courts between nondeclarants and declarants, and between friendly, neutral and enemy aliens, an effort is here being made to present the cases by subdivisions in two main groups, nondeclarants and declarants.

A. NONDECLARANTS

1. *Friendly aliens.* In the case of Shanin,[21] a Russian who had been accorded exemption as a nondeclarant alien, the terms "well disposed" and "attachment" as used in the naturalization statute were defined by the court. It declared:

> The expression "well disposed to the good order and happiness of the same" refers more particularly to the mental attitude of the petitioner toward this country, and doubtless was inserted in order to exclude from citizenship persons who disbelieve in the form of government embodied in our Constitution or are hostile to it. I see no reason to doubt that the petitioner is "well disposed to the good order and happiness of" this country. The present case appears to turn on the preceding phrase, "attached to the principles of the Constitution of

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As to the classes of aliens subject to the draft, see also Ch. XII, Secs. 1, 2, 3 and 4, Act of July 9, 1918; 40 Stat. 845, 884–885. No attempt, however, is made in this article to determine the liability of aliens to military service under the draft. In this latter connection, see the comprehensive treatment of the subject under the title, "Classification Principles and Results, (I) Alienage," Ch. IV, pp. 86–108, inclusive, Second Report, Provost Marshal General, Washington, Government Printing Office (1919). See also the very full treatment by Sterling E. Edmunds, in article, "Aliens and the Draft," in St. Louis Law Review, St. Louis, Mo., Vol. V, No. 1 (March, 1920), pp. 23–36.

While nondeclarant aliens were not subject to the draft under the terms of the Selective Service Law, the conventions entered into between the United States and Great Britain, Greece, France, and Italy, authorized the reciprocal drafting of both declarant and nondeclarant nationals. Ratifications were exchanged as follows: as to Great Britain, July 30, 1918 (40 Stat. 1620); as to Canada, July 30, 1918 (40 Stat. 1624); as to Greece, November 12, 1918 (40 Stat. 1637); as to France, November 8, 1918 (40 Stat. 1629); and as to Italy, November 12, 1918 (40 Stat. 1633). The conventions were printed in the Supplement to this JOURNAL as follows: Canada, Vol, 12, p. 270; France, Vol. 13, p. 141; Great Britain, Vol. 12, p. 265; Greece, Vol. 13, p. 144; Italy, Vol. 13, p. 147. The conventions provided that alien residents should be allowed an opportunity to enlist in the forces of their own governments, and that, failing to do so within a prescribed time, they should become subject to the selective draft regulations of the country in which they were then residing.

[20] A "declarant" is a person who *has made* the formal declaration of intention to become a citizen of the United States required of practically all aliens before filing the petition for naturalization. A "nondeclarant" is a person who *has not made* such declaration.

[21] *In re* Shanin (D. C. Mass., Morton, DJ., 1922), 278 Fed. 739, 740.

> the United States." Attachment to the principles of the Constitution means, I take it, attachment to the principles of free government which are embodied in that instrument. "Attachment" is a stronger word than "well disposed." Used in this connection it implies, I think, a depth of conviction which would lead to active support of the principles in question, to doing one's share to maintain them.

The court found that Shanin, although resident here for several years at the time of the war, was not willing to render military service.

> Moreover, the petitioner made no declaration of intention until the danger of the war was passed, and then he speedily filed the one on which he now relies. It seems probable, in spite of his protestations to the contrary, that he withheld his declaration for the purpose of avoiding military service, which emphasizes his lack of attachment to the country, and amounts, perhaps, to a fraud on the law.[22]

Bevelacqua, an Italian, and Gitelman and Tsaler, Russians, who claimed exemption, were said to have shown themselves willing to enjoy the advantages of living in the United States without being willing to make any sacrifice for their adopted country. Said the court:[23] "They evidently felt no obligation to the United States, and were not, in my opinion, 'attached to the principles of the Constitution of the United States.'" But some recusants might change their feelings and become attached to the principles of our government. Some *locus poenitentiae*, therefore, should be allowed them. The war was officially declared to be at an end July 2, 1921.[24] The court continued:[25]

> In my opinion, a continuing refusal to serve in the war against Germany should operate to prevent a resident alien so refusing from being considered as "attached to the principles of the Constitution of the United States" during the entire time of the official duration of the war. If a person has lived for five years continuously after July 2, 1921, in the United States, I think that he may be found to be qualified for citizenship, although he refused to serve in the war with Germany, provided that after that date he filed his declaration of intention to become a citizen, and it appears affirmatively that his attitude towards his adopted country has changed.

In the case of Tutun, native of Russia, the United States District Court (Lowell, DJ.) refused to hear the witnesses supporting the petition for naturalization as to his attachment to the principles of the Constitution and proper disposition toward the United States. The court held that his claim of exemption was conclusive proof that he was not so attached and denied the petition. This action was reversed by the Circuit Court of Appeals, which

[22] *In re* Shanin (D. C. Mass., Morton, DJ., 1922), 278 Fed. 740–741.

[23] *In re* Bevelacqua; *In re* Gitelman *et al.*; *In re* Tsaler (D. C. Mass., Lowell, DJ., 1924), 295 Fed. 862, 863.

[24] Joint Res. of July 2, 1921; 42 Stat. 105–107. [25] *In re* Bevelacqua *et al.*, *supra*, p. 864.

expressed the opinion that denial on that sole ground was unwarranted by law—that the District Court had no power, through the exercise of an arbitrary discretion, to add to the legal requirements laid down by Congress.[26]

The naturalization of Levy and five other nondeclarant aliens who had claimed exemption was objected to on the ground that such action "conclusively evidenced a want of attachment on their part to the principles of the Constitution, and a want of a well disposal to the good order and happiness of the United States, which cannot be overcome by other evidence."[27] With this the court did not agree, stating that the applicants were not subject to military duty in the army of the United States, were not included in the draft act, and could not be exempted from a duty the law did not place upon them. The court further said:[28]

> They were not citizens, and we had no right to expect them to assume the duties, the highest duties, of citizenship. And their refusal to do so, in my opinion, does not show, or at least does not conclusively show, that at the same time they were not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.

All were naturalized.

2. *Neutral aliens.* Escher, a Swiss,[29] asserted a claim for exemption. In 1919 he made his declaration of intention and two years later filed petition for naturalization. Such claim is said to have raised the presumption that at the time and prior thereto Escher had no intention of becoming a citizen of this country. The court declared:[30]

[26] Tutun *v.* United States (C. C. A., 1st Cir., Bingham, Johnson, and Anderson, CJJ., 1926), 12 F. (2d) 763, 764.

[27] *In re* Levy and five other cases (D. C. W. D. Texas, El Paso Div., Smith, DJ., 1922), 278 Fed. 621, 622.

[28] *Ibid.*, p. 623.

Another court presents a comprehensive review of the naturalization status of aliens under the Selective Service Law. The government had objected to the naturalization of a number of aliens who had claimed exemption, looking upon such claims as evidence conclusive in bar of naturalization. The court decided, among other points, that resident nonenemy aliens who had not declared their intention to become citizens, were not disqualified for citizenship by affirmative answers in their questionnaires claiming such exemption. This conclusion was based on the fact that such aliens were excluded from service by the Selective Service Law. *In re* Naturalization of Aliens Who Claimed Exemption from the Draft or from Military Service (D. C. E. D. Wis., Geiger, DJ., 1924), 1 F. (2d) 594, 597, 601.

[29] Petition of Escher (D. C. S. D. Texas, Houston, Hutcheson, DJ., 1922), 279 Fed. 792, 793. The real basis of exclusion from naturalization, however, is found in the fact that the petitioner had not, during the five years he counted upon to complete his probation, been at all times desirous of entering into citizenship, waiting only for the "accolade." The court felt that Escher's intention to become a citizen did not begin until he had filed his declaration of intention.

[30] *Ibid.*, p. 793.

> In the light of this statute, which provides a probation of five years for an applicant for citizenship, during which in effect the applicant is with a heart single alone to the interests of the United States, and with a mind animated by the purpose to enter into membership in the greatest order in the world, citizenship in this republic, waiting for the time to come when he may worthily enter, it is clear that the application of the petitioner for admission now should be denied.

3. *Enemy aliens.* The rule announced in the case of Linder, a German,[31] was quite widely followed. He did not make his declaration of intention until 1919. He had previously claimed and was allowed exemption from military service. His petition for naturalization having been denied because of such claim, request was made of the court for leave to file a new application. The court thus announced its attitude:[32]

> It has been my belief at all times that those who came to America, not as mere sojourners, but with the intention of remaining here, making this land their home, availing themselves of the protection afforded by this government, and enjoying the opportunities derivable in virtue of its protecting care, owed at least a moral obligation to assist this government whenever it should be in need of their services. In consequence, with respect to those falling within that category who claimed exemption from the draft during the World War on account of the fact that they were not citizens of this country, whether they had previously executed a declaration of intention or not, I have consistently held that their applications for final citizenship papers should be denied on the ground of a want of loyalty. . . . They were not fitted for complete acceptance into the great American household of faith.

However, the court felt that "to permit such civic delinquents to remain in our midst, and yet to deny to them the proud privilege of American citizenship, was to foster a growing menace." They would become morose, probably hostile, and capable of working infinite danger to us and our institutions. By implication, such disloyal attitude would continue as long as their obligation to serve the United States existed and they continued to decline it—to the Armistice, November 11, 1918, at least.

B. DECLARANTS

1. *Friendly aliens.* The duty of the declarant in relation to military service is thus expressed by one court:[33]

[31] *In re* Linder (D. C. S. D. Calif., S. D., Bledsoe, DJ., with James, DJ., concurring, 1923), 292 Fed. 1001, 1002.

[32] *Ibid.*, p. 1002.

In a decision already referred to, nondeclarant enemy aliens who claimed exemption were held not disqualified for citizenship, such persons being specifically excluded from any duty or opportunity to serve by the Selective Service Law. *In re* Naturalization of Aliens, etc., *supra*. As to refusal to accept alien enemy for service, see Selective Service Regulations, *supra*, Sec. 79, Rule XII (e). Notes 1 and 2, p. 51.

[33] *In re* Pitto; *In re* Kirby; *In re* Teuscher (D. C. Ore., Wolverton, DJ., 1923), 293 Fed. 200, 201.

> The petitioner [Pitto, an Italian declarant] must know that, from the time of his declaration of intention, he has assumed certain correlative duties to this country, among which is the duty to comply with the laws thereof, "including those imposing public duties upon aliens of his class." . . . No one doubts that citizens of the government owe thereto the reciprocal obligation to render military service in case of need. . . .
>
> The making and filing of a declaration of intention contemplates the full and cordial assumption of such obligation, and the declarant owes it to the government that he thenceforth hold a consistent course indicative of allegiance thereto. It is certainly a badge of disloyalty, and wholly inconsistent with good faith, for one who has declared his intention to become a citizen of the country, having in view the obligations which the oath imposes, to decline military service on the ground of his alienage.

The declaration of intention of Pitto was held invalid.

Rubin, a citizen of Russia, had claimed exemption, but his claim was not granted, although one on account of physical incapacity was allowed. He was denied naturalization as having indicated "such lack of loyalty to this country that it could not be said that he was attached to the principles of our Constitution and well disposed to the good order and happiness of our country." [34]

In the case of Tomarchio,[35] an Italian subject, his declaration of intention was declared canceled and his petition for naturalization denied with prejudice for the reasons set forth in the case of Silberschutz.[36] Said the court in the Tomarchio case:[37]

> . . . Candidates, who during the war pleaded their alien status in bar to the performance of military duty, will now be found most vehement in their protestations of loyalty, and of their yearning to take up arms in the defense of the country of their adoption. Fighting ceased some two years ago, and there is now no longer any danger attached to their tardy proffers of military assistance. When soldiers were needed, however, these fair-weather friends were to be found tying the hands of the local draft boards through pleading their alien status. . . .

One Sigelman, a Russian,[38] had left his family in the country of his birth. He desired citizenship mainly for the purpose of procuring a passport to return to Russia in order to bring his family here. Applicant had secured deferred classification under the draft upon the representation that his wife and children, who had never been in the United States, were mainly dependent upon his labor for support. In connection with his petition for

[34] *In re* Rubin (D. C. E. D. Mich., S. D., Tuttle, DJ., 1921), 272 Fed. 697, 698.

[35] *In re* Tomarchio (D. C. E. D. Mo., E. D., Dyer, DJ., 1920), 269 Fed. 400.

[36] *In re* Silberschutz (D. C. E. D. Mo., E. D., Dyer, DJ., 1920), 269 Fed. 398. [See *infra.*]

[37] *In re* Tomarchio, *supra*, p. 406.

[38] *In re* Sigelman (D. C. E. D. Mo., E. D., Faris, DJ., 1920), 268 Fed. 217, 218, 219.

naturalization, however, he admitted he had been unable to communicate in any manner with his family since 1913. The representation as to his family's alleged dependence was made, it seems, to evade induction into the military service of the United States. The obvious inference, said the court, "his asseverations notwithstanding, is that he is not sufficiently attached to the institutions and government of the United States to make him willing to fight in their defense." The petition was denied.

Norman, subject of Great Britain, whose petition for naturalization had been denied by a State court because he claimed exemption from military service, presented a motion to the United States District Court for leave to file another petition.[39] The motion was denied on the ground that the proceedings were in effect a collateral attack on the State court's judgment, which latter was *res judicata* and impregnable. The Federal court suggests the possibility that the determination of the alleged unfitness of the applicant for admission to citizenship might be imputed to

> that fierce, fiery, and intolerant emotionalism that in religion takes the form of the Inquisition, St. Bartholomew's, and Smithfield, and in citizenship too often finds expression only in anathema upon those who fail to measure up to individual standards of patriotism to which their sponsors do not conform.

While the following pronouncement was made in the alien enemy case of Miegel,[40] who was naturalized, and therefore is dictum only as to the case of a declarant nonenemy petitioner for naturalization, it appears to be of sufficient interest to be recorded. Referring to declarant aliens who were not alien enemies, but who nevertheless claimed to be exempt under the Selective Service Law, the court says:

> . . . Not only were such aliens free to avail themselves of the opportunity and right to take their places among the ranks of the military defenders of this country, but it was their solemn duty, under the law and according to all of the dictates of patriotism, to respond to the call of the nation, in its great emergency, to take up arms in its defense. No argument is required to make it clear and obvious that an American citizen who is unwilling to fight for his country, at whatever sacrifice to himself, is unfit to be an American citizen. . . .
>
> All this is applicable, with equal force, to the alien who, having solemnly declared his intention to become a citizen of this country, and having been granted an opportunity, and indeed required, to fulfill the most important and essential obligation that a citizen or prospective citizen owes to the nation when summoned to defend it from its enemies

[39] *In re* Norman (D. C. Mont., Bourquin, DJ., 1919), 256 Fed. 543, 544.

[40] *In re* Miegel (D. C. E. D. Mich., S. D., Tuttle, DJ., 1921), 272 Fed. 688, 696. [See *infra.*]

Declarant nonenemy resident aliens who made claims of exemption from military service on account of noncitizenship, were granted naturalization over objection. It was held that as they were not entitled under the draft law and regulations to exemption, their claim therefor was ineffective. *In re* Naturalization of Aliens, etc., *supra.*

> on the field of battle, fails in this supreme test of loyalty, and not only attempts to escape from such obligation, but to present a false pretext for such attempted escape. That such an alien is not attached to the principles of the Constitution of the United States, and is not well disposed to the good order and happiness of the same, is too plain for further discussion. . . .

2. *Neutral aliens.* *In re* Loen [41] involved a Norwegian who had surrendered his declaration of intention to the Norwegian consul for the purpose of avoiding military service as an alien. Before his request could be acted upon he was inducted into the army, and then the Armistice was signed. Although given the opportunity to become a citizen while in the service, he had declined it. Later, Loen attempted to be naturalized on the basis of his military service. The court denied his petition with prejudice, saying: [42]

> . . . the applicant had declared his intention to become a citizen, and under oath declared his willingness to renounce all allegiance to foreign sovereignty. By that oath he solemnly swore it to be his *bona fide* intention to transfer his citizenship and allegiance. This implied willingness and intention to defend the flag, to support the Constitution and laws of the United States; and, when invitation was extended, he declined to do so, thereby repudiating his declared intention, and asserted under oath preference for his native country. . . .
>
> Citizenship and allegiance to this country are made of sterner stuff. He is not fitted to take the oath of allegiance. Interpretation of the oath of allegiance is more than a mere formula of words. . . . It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its Constitution and laws, which moves him in sincerity to dedicate his life to its service, and conscientiously agree to defend it against all enemies and the implanting in his soul of a sincere determination that in the hour of danger or attack upon the Constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. . . .

One Hauge, a Norwegian, had testified on the hearing of his petition for naturalization that he had not claimed exemption from military service on the ground of alienage. In a prosecution for perjury, the appellate court, in holding the testimony material, said: [43]

> What finer test of the disposition of one who wishes to be naturalized can be conceived of than to ascertain whether he is willing to support and defend the nation in time of war? How can one be really attached to the principles of the Constitution and be well disposed to the good order and happiness of the nation, and attempt to escape from the obligation to defend the country, on the ground that he is an alien and willing to return to his native country and enter its military service? It is wholly inconsistent with the fundamentals of loyalty and good

[41] *In re* Loen (D. C. W. D. Wash., N. D., Neterer, DJ., 1919), 262 Fed. 166.

[42] *Ibid.*, pp. 167–168.

[43] Hauge *v.* United States (C. C. A., 9th Cir., Gilbert and Hunt, CJJ., and Rudkin, DJ., 1921), 276 Fed. 111, 113.

> faith to say that where a plea of alienage is deliberately set up in an endeavor to avoid military service, the alien can shortly afterwards apply for naturalization and be adjudged entitled to the privileges of citizenship. . . .

Applicant Trachsel,[44] a citizen of Switzerland who had made his declaration of intention some years before the United States was drawn into the World War, claimed exemption. He stated his willingness to return to his native country and enter its military service, and requested the benefits of Article 2 of the treaty concluded with Switzerland on November 25, 1850,[45] which freed citizens of the one country, residing or established in the other, from personal military service. The court denied Trachsel's petition for naturalization on the ground that his claim of exemption, being inconsistent with his declaration of intention, had resulted in the abandonment of his declaration. The court said:[46]

> . . . Willingness to abandon his previous rights as an alien resident and to comply with his legally prescribed duties as a declarant is a necessary concomitant of a sincere intention to renounce foreign allegiance and embrace American citizenship.

The case, *In re* Gustavson,[47] Gustavson being a Swedish subject, raised two questions. While a declarant, he had claimed exemption from military service on the ground of alienage. He had also surrendered his declaration of intention to be relieved from such service under the provisions of the Act of July 9, 1918,[48] which statute forever debars from becoming a citizen one who takes advantage of its terms. Gustavson, however, was not relieved from service but actually served during the war and received an honorable discharge. The court held that under its established rule, the claim of exemption was sufficient to show a lack of loyalty, which would be presumed to have continued during the entire period of the war and required the denial of his petition for naturalization. A new declaration of intention subsequent to the Armistice and the expiration of five years from such new declaration were required before a new petition for naturalization might be filed. As to the penalty under the Act of July 9, 1918, the court held that it had not been incurred as the government had not relieved the declarant from military service.

Teuscher, a Swiss,[49] had made a declaration of intention in 1909 which lapsed in 1916 through the expiration of the seven-year limitation thereon. He claimed exemption from military service because of alienage. Later, in 1920, he redeclared his intention and based his petition for naturalization

[44] *In re* Trachsel (D. C. S. D. Ohio, W. D., Peck, DJ., 1921), 271 Fed. 779.

[45] 11 Stat. 587, 589.

[46] *In re* Trachsel, *supra*, p. 780.

[47] *In re* Gustavson (D. C. S. D. Calif., S. D., James, DJ., 1924), 300 Fed. 251.

[48] *Supra.*

[49] *In re* Pitto; *In re* Kirby; *In re* Teuscher (D. C. Ore., Wolverton, DJ., 1923), 293 Fed. 200.

on the new declaration. Was this later declaration valid in view of the claim of exemption? The court held that it was and the applicant entitled to naturalization.

A Norwegian declarant, Siem, registered for the draft and claimed exemption on three grounds, dependency, alienage and physical unfitness. He was rejected as physically unfit. His petition for naturalization was opposed because of his claim of alienage. The District Court held in his favor, saying:[50]

> The distinguishing and supreme obligation of citizenship and its permanent allegiance is military service. It has its antecedent in the feudal system wherein the vassal makes oath of fealty to his lord and serves him in war, as a consideration and payment for the land and protection he receives from his lord. So the citizen born to or making oath of allegiance likewise renders military service to the country in payment of and in consideration for the advantages, rights, and protection it extends to him. As these latter are the possession of citizens, and not of aliens, the consequence is that the obligation of military service that attends them attaches only when the alien is admitted to citizenship. It cannot attach before admission. . . .
>
> Despite the political status and obligations of aliens—and the word includes declarant aliens—and although the Naturalization Act does not expressly require as a condition to admission that the alien shall have entered military service, the argument is that his mere claim of exemption from the draft manifests he is not "attached to the principles of the Constitution"; that is, that the requirement of military service on demand is implied. Such implication is neither necessary nor warranted. "Attached" in reference to principles, by all standard authorities, means "having regard and affection for" and "sustaining by moral force."
>
> That this is the meaning of the word, as used in the Naturalization Act, seems obvious in the light of the law of nations, the political status of persons, and the other provisions of the act, all of which must be taken in account in proper interpretation. It is not reasonable to infer that Congress intended to compel or persuade aliens to enter Federal military service, and thus to violate their allegiance, to offend their countries, and to invite foreign resentment against this country and the aliens. . . . Although petitioner was attached to, had affection for, the principles of the Constitution, his duty was to Norway; and between affection and duty, always, everywhere, in all circumstances, law and good morals dictate choice of duty. Upon the whole, when petitioner claimed exemption, he obeyed all law and violated none, performed his duty to both this country and Norway, conformed to good morals, and manifested that he was "attached to the principles of the Constitution."
>
> It was the government that violated both law and morals, in subjecting him to the draft. And for it to contend that his mild insistence upon the right of exemption demonstrates unfitness for citizenship savors much of the tyrant's bitter complaint that his victims refused to die quietly and disturbed his sleep by their indecent wails of agony.

[50] *In re* Siem (D. C. Mont., Bourquin, DJ., 1922), 284 Fed. 868, 869, 870–872.

A petition to cancel such naturalization having been denied, an appeal was taken to the Circuit Court of Appeals which affirmed the lower court, saying:[51]

> . . . we find no ground for holding that such claim of exemption absolutely proves that the applicant's declaration of intention to become a citizen is made *mala fide*, or that he is not well disposed to the good order and happiness of the United States, or not attached to the principles of the Constitution. In other words, we are not convinced that the mere fact that the applicant has claimed exemption from military service is sufficient in itself, as a matter of law, to require the cancellation of his certificate of citizenship, . . .

3. *Enemy aliens.* One Silberschutz, an Austro-Hungarian who had made his declaration of intention prior to the war between the United States and that country, claimed exemption as an alien enemy. His petition for naturalization was denied with prejudice because such claim negatived the *bona fides* of his declaration of intention. The court said, in part:[52]

> . . . the assertion by the petitioner of this claim for exemption as an alien establishes that he was not, during all of the period of five years immediately preceding the date of filing of his petition for naturalization, attached to the principles of the Constitution of the United States of America, and that he was not well disposed to the good order and happiness of the same, and that he was not willing in the hour of our national peril to support and defend the Constitution of the United States of America against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

In the case of Kirby, an enemy declarant who had claimed exemption, the court held as in the case of Pitto,[53] a friendly declarant, that such action was disloyal and the declaration invalid. The court further held that it was not deemed material that the applicant was an alien enemy.

In re Miegel,[54] contains an extended discussion of the Selective Service Law, with particular reference to the classes of aliens brought within its scope. Miegel was an alien enemy (German) to whose naturalization the Government objected. It was contended that his claim for exemption disqualified him by violating the *bona fides* of his declaration of intention, thus constituting an abandonment and a voiding of it. The court said:[55]

> The question whether an enemy alien, by claiming the exemption from military service established by law, thereby indicated such disloyalty to the United States as to deprive him of the privilege of American citizenship, includes and involves one, and perhaps two, entirely

[51] United States *v.* Siem (C. C. A., 9th Cir., Gilbert, Ross and Rudkin, CJJ., 1924), 299 Fed. 582, 583–584.

[52] *In re* Silberschutz (D. C. E. D. Mo., E. D., Dyer, DJ., 1920), 269 Fed. 398, 399–400.

[53] *In re* Pitto; *In re* Kirby; *In re* Teuscher, *supra*, p. 202.

[54] *In re* Miegel (D. C. E. D. Mich., S. D., Tuttle, DJ., 1921), 272 Fed. 688. [See *supra.*]

[55] *Ibid.*, pp. 692, 694, 695, 697.

> separate and distinct questions. The first of these may be stated as follows: Is the mere act of claiming a legally created exemption from military service, inherently and of itself, aside entirely from the nature of the particular ground for such exemption, an act of disloyalty? . . . If, however, such question be answered in the negative, the phase of the question still to be considered is: Does the mere assertion by an enemy alien of the fact of his status, as the basis for legal procedure depending upon and resulting, as a matter of law, from such status, in itself show disloyalty? . . . The Selective Service Regulations had positively enjoined upon the draft officials, as a strict duty, the necessity of seeing that no alien enemy should be accepted into the army, regardless of his own wishes. . . . It seems plain, then, that the mere act of claiming an exemption from military service which has been established by law is not, in itself, an act of disloyalty. In other words, there is nothing inherently wrong or unpatriotic in claiming such an exemption. . . . The law of the land having made alienage a ground for certain procedure, such alien could not properly be considered lacking in attachment to the principles of our Constitution or ill disposed to the good order and happiness of the United States and unfit for American citizenship merely because he formally stated the true facts concerning his status and followed the special procedure legally dependent thereon.

Miegel's application for naturalization was granted. The court thus stated the true distinction between alien enemies, and other aliens who have made their declarations of intention: "One was by law barred from military service, while the other by the same law was required to render such service. It is plain that the claim which was obedience and loyalty for the one was disobedience and disloyalty for the other."

The same conclusion was reached as to declarant alien enemies by the Wisconsin Federal court already referred to.[56] As the law specifically excluded them from military service, an affirmative response to the question as to their willingness to serve would have been futile.

III. Naturalized Citizens whose Loyalty was Questioned subsequent to their Acquisition of Citizenship

As was to have been expected, the World War aroused strong feelings and bitter resentments. The question soon arose whether naturalization could be set aside because of the adopted citizen's disloyal attitude *subsequent* to his acquisition of citizenship.[57]

[56] *In re* Naturalization of Aliens, etc., *supra*.

[57] This article does not purport to discuss the subject of freedom of speech. On that subject, see "Freedom of Speech in War Time," an exhaustive article by Zechariah Chafee, Jr., Harvard Law Review, Vol. 32, No. 8 (June, 1919), pp. 932–973.

There had been in operation for some time a statutory rule of evidence by which subsequent acts might be accepted as evidence of a prior status. The taking up of permanent residence in his native or any other foreign country by a naturalized citizen within five years after the issuance to him of a naturalization certificate was made *prima facie* evidence of a lack of intention on the part of such applicant to become a permanent citizen at the time of

Wursterbarth, former German, had been naturalized in 1882. During the participation by the United States in the World War, he refused contributions to the Red Cross and Y. M. C. A. funds, would do nothing to help defeat Germany, and did not wish the United States to win because of the ties which bound him to Germany. In proceedings to cancel his naturalization for fraud and illegality in having retained an allegiance to Germany and its ruler, the court said:[58]

> . . . As the years succeeding his naturalization passed, coupled with the fact that he continued to dwell in our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office (as the proofs show that he did), it is natural to presume that his affection and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease.
>
> If, therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens.

Decree was directed to be entered setting aside the naturalization.

Another former German, Schurmann, who had become a citizen in 1904, talked himself out of his naturalization papers. Both before and after the

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his application. Cancellation of his naturalization for fraud was authorized in the absence of countervailing evidence to overcome the adverse presumption. Par. 2, Sec. 15, Act of June 29, 1906, 34 Stat. 601; U. S. C. t. 8, Sec. 405.

The Supreme Court of the United States had sustained the validity of this provision, saying: "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. . . ." Luria *v.* United States (1913), 231 U. S. 9, 25, quoting from Mobile &c. Railroad Co. *v.* Turnipseed (1910), 219 U. S. 35, 42.

This principle was made use of later by the naturalization courts in determining the effectiveness of the purported renunciation of former allegiance of the naturalized persons whose loyalty was in question. In applying the principle, the Circuit Court of Appeals for the Seventh Circuit, in the Glaser case, affirmed the action of the District Court cancelling Glaser's naturalization. It was charged that he had deceived the naturalization court as to his belief in organized government and his adherence to the principles of the Constitution of the United States. The appellate court said: "Subsequent acts and declarations of appellant were properly admitted as tending to disclose his state of mind when he signed his petition for naturalization. On the whole, we regard the evidence as adequate to sustain the finding of the trial court." Glaser *v.* United States (C. C. A., 7th Cir., Baker, Alschuler, and Evans, CJJ., 1923), 289 Fed. 255.

[58] United States *v.* Wursterbarth (D. C. N. J., Haight, DJ., 1918), 249 Fed. 908, 910.

declaration of war between the United States and Germany, Schurmann made many remarks showing that his feelings were entirely on the side of Germany. In affirming on appeal the action of the District Court in canceling the naturalization, the Circuit Court of Appeals said:[59]

> . . . Under the circumstances of the case, the only way of arriving at what the fidelity and allegiance of Schurmann were in December, 1904, is by trying out his attitude of mind and heart in the later years of 1916 and 1917, when, under then existing conditions men were specially aroused to give utterance to their real sentiments and to avow loyalty to one or another of the belligerent nations. . . . it was in the crucial times of 1917 that the respondent failed in the fundamental obligation to his oath of true faith and allegiance in 1904. . . . One . . . whose frequent expressions were so plainly against the United States and in favor of Germany, must have taken the oath of full faith and allegiance with a reserved determination, to be kept down, but nurtured, until a momentous time might come. In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment.

The same view had been taken earlier in the case of Kramer,[60] also a German. Though naturalized in 1912, in May, 1917, he was repeatedly guilty of making remarks showing his disloyalty to the United States and sympathy with Germany. On appeal, the Circuit Court of Appeals reversed the decree of dismissal by the lower court of the government's suit to set aside the naturalization, and remanded the case for further proceedings, saying:[61]

> American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith, without any mental reservation whatever, and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not, he is guilty of fraud in obtaining his certificate of citizenship.
>
> There can be no doubt that, had the defendant in this case been guilty of the utterances with which he is charged before his naturalization, and that fact had been known to the court, he would not have been admitted. . . .

In the case of still another German, Herberger,[62] also naturalized in 1912, he appeared to be more interested in the welfare of Germany than of the United States, expressed his sympathy with Germany, and was disloyal to this country. The naturalization was revoked, the court saying:[63]

[59] Schurmann *v.* United States (C. C. A., 9th Cir., Gilbert, and Hunt, CJJ., and Wolverton, DJ., 1920), 264 Fed. 917, 920.

[60] United States *v.* Kramer (C. C. A., 5th Cir., Walker, CJ., and Foster and Grubb, DJJ., 1919), 262 Fed. 395.

[61] *Ibid.*, p. 397.

[62] United States *v.* Herberger (D. C. W. D. Wash., N. D., Cushman, DJ., 1921), 272 Fed. 278.

[63] *Ibid.*, p. 291. The same judge had denied a motion to dismiss a similar suit where the

> Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter.

However, a Federal appellate court, in the Rowan case,[64] decided that it is far too conjectural to hold that Rowan, who was not, when naturalized in 1907, a member of such an organization as the Industrial Workers of the World, must in 1907 have been opposed to organized government or been lacking in allegiance by merely joining that organization in 1912 and remaining a member through 1917. Nor, in the court's opinion, was the proven fact that ten years after 1907 he was guilty of violation of the Espionage Act, logically probative of Rowan's state of mind in 1907.

Another reversal sustained by the government was in the Woerndle case.[65] Respondent was charged with having falsely sworn that he renounced allegiance to his native country, Germany, upon his naturalization in 1904. The United States brought suit to cancel the naturalization. The suit having been dismissed, the government appealed. The evidence showed that prior to the time the United States became involved in the World War, Woerndle sympathized deeply with Germany, and occasionally criticized the attitude toward the war of the people of the United States, the administration, and particularly the President. But from the date the United States entered the war, the court states there was no evidence of any disloyal utterance or disloyal act on the part of the appellee. The testimony showed that Woerndle had fraudulently obtained a passport in his own name for one Boehm, a German, formerly a captain in the German army. Woerndle also gave Boehm a certified copy of the former's certificate of citizenship and an original patent issued to Woerndle, to land in California. Assuming Woerndle's name and taking these evidences of Woerndle's identity, Boehm left the United States for Germany, prior to the entry of the United States

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naturalization, granted in 1888, was attacked by the government on the same ground. The court said of defendant in that case: "The language charged to have been used by him, standing by itself, tends to show loyalty and allegiance to Germany, rather than to the United States. Such positive expressions of alien allegiance repeatedly made during a year's time, uncontradicted and unexplained, give rise to a presumption of some continuity and duration of existence. . . ." United States *v.* Darmer (D. C. W. D. Wash., S. D., Cushman, DJ., 1918), 249 Fed. 989, 990.

[64] Rowan *v.* United States (C. C. A., 9th Cir., Hunt, Rudkin, and Dietrich, CJJ., 1927), 18 F. (2d) 246, 248.

[65] United States *v.* Woerndle (C. C. A., 9th Cir., Gilbert, Morrow, and Rudkin, CJJ., 1923), 288 Fed. 47.

into the war. Appellee, an attorney at law, knew his act was punishable as a felony. He attempted to explain it by his deep feeling of sorrow for Germany. Considering all the evidence, the court was not convinced that Woerndle intended to subordinate his allegiance to the United States to his allegiance to his native country, or that he was fraudulently naturalized. The court affirmed the judgment of dismissal below, saying:[66]

> . . . His act, reprehensible and criminal as it is, can hardly be referred to as indicative of his mental attitude toward the United States at the time when, 10 years before, he was applying for a certificate of naturalization. Citizenship, once bestowed upon proceedings in the Federal courts, should not be lightly taken away. The evidence that the applicant, while taking the oath of allegiance, still retained in his heart a fraudulently concealed and stronger allegiance to another country, should be more clear and convincing than it is in the present case.

* * * * *

The matter under discussion may be briefly summarized as follows: Although the requirements concerning attachment to the principles of the Constitution have been a part of the naturalization statutes since 1795,[67] practically all of the reported judicial opinions construing them have been rendered within the past decade. This situation has been due largely to conditions growing out of the World War.

The "conscientious objector" has not been regarded favorably by either the law-making or law-interpreting agency of government. A duty on the part of all citizens—male and female alike—to defend the government by force of arms in case of necessity has been enunciated as a fundamental principle of the Federal Constitution.

The action of many alien applicants for naturalization, whether they were friendly, neutral or enemy, in claiming exemption from military service during the World War under the draft because of alienage, was strongly condemned by the courts generally. As a result, about thirty thousand petitions for naturalization were denied upon the ground that the attitude of such applicants was disloyal, and evidence of a lack of attachment to the principles of the Constitution. Loyalty might, however, be later established through subsequent conduct, and another application filed in due time. A few courts refused to deny the applications of those aliens who, when they claimed exemption, had not made their declarations of intention or were alien enemies, holding that such claim was immaterial, there being no legal duty upon the members of either group to serve in the armed forces of this country.

The attitude of an applicant is usually made manifest by acts, but opinions, views and beliefs may also disqualify for naturalization, as witness the case of Madam Schwimmer. The naturalization statute itself makes certain beliefs or disbeliefs a disqualification.

[66] United States *v.* Woerndle (C. C. A., 9th Cir., Gilbert, Morrow, and Rudkin, CJJ., 1923), 288 Fed. 47, p. 49. [67] Subd. 3, Sec. 1, Act of January 29, 1795; 1 Stat. 414.

A number of naturalized citizens who were discovered to be strongly sympathetic with Germany after we entered the war had their naturalizations revoked on the ground of fraudulent procurement—that they had not entirely renounced allegiance to Germany when naturalized here, but had reserved a loyalty to their countries of origin. Subsequent conduct was accepted as evidence of the prior state of mind which existed at the time of naturalization. But the proof of fraud in such cases must be clear and convincing.

It may be fairly asserted that the character of the naturalization proceeding itself and the value attached to the privilege—citizenship—granted through it have been largely responsible for the high standard of requirements for admission maintained by the courts. The Supreme Court of the United States, taking the lead, has firmly laid down the following propositions: Although proceedings for admission to citizenship of the United States by naturalization are judicial, they are not for the usual purpose of vindicating an existing right but are for the purpose of granting to an alien rights that do not yet exist. Hence, not only the conditions attached to the grant, but those attached to the power of the instrument (the courts) used by the United States to make the grant must be complied with strictly, as in other instances of government gifts.[68] The Naturalization Act of 1906[69] specifies with circumstantiality the manner, and not otherwise, in which an alien may be admitted to become a citizen.[70] An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist.[71] No alien has the slightest right to naturalization unless all statutory requirements are complied with. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.[72] Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.[73]

One of the most important safeguards against the improper granting of

[68] Maney *v.* United States (1928), 278 U. S. 17, 22.
[69] Act of June 29, 1906, 34 Stat. 596; U. S. C. t. 8; as amended.
[70] United States *v.* Ginsberg (1917), 243 U. S. 472, 473.
[71] Johannessen *v.* United States (1912), 225 U. S. 227, 240, quoting with approval from United States *v.* Spohrer (Judge Cross), 175 Fed. 440, 442.
[72] United States *v.* Ginsberg, *supra*, pp. 474, 475.
[73] United States *v.* Manzi (1928), 276 U. S. 463, 467.

naturalization is the insistence by the Supreme Court upon the observance of the rule of strict construction in favor of the government. The last expression from that court is so clear and forceful that it forms a fitting conclusion:[74]

> And, when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

[74] The United States of America, Petitioner, *v.* Rosika Schwimmer, *supra*, 49 S. Ct. 450. [Advance Sheets.]

EDITORIAL COMMENT

FREEDOM OF THE SEAS

The second of President Wilson's famous fourteen "peace points," which was not textually embodied in the Covenant of the League of Nations, has been revived and announced as a governmental policy by the British Labor Party, now exercising the authority of the British Government as a result of its success in the recent general election in Great Britain.

In its election campaign, the Labor Party stood for "the complete renunciation of the right of private war and private blockade" coupled with "the full acceptance of the new doctrine of the freedom of the seas." The new doctrine referred to was expressed in the second peace point as follows: "Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed, in whole or in part, by international action for the enforcement of international covenants."

The reasons announced by the Labor Party during the election campaign, and by unofficial spokesmen on behalf of the present British Government, and the ends sought in adopting this new policy, are set out in a pamphlet published by that party, with a foreword of endorsement by the Right Honorable J. Ramsay MacDonald, the present Prime Minister.

In this pamphlet it is recognized that in time of war there is an irreconcilable conflict between belligerent and neutral rights on the high seas, which presents the historic issue of "Freedom of the Seas" *versus* "Command of the Seas" and raises the fundamental question of what is the real purpose of naval armament.

The weakness of the old style "freedom of the seas" was demonstrated in the World War when practically all the concessions which had been gained for neutrals in this controversy were ignored and abandoned. The trouble was that, apart from the laws invoked against the use of submarines as neutral commerce destroyers, none of the rules relied upon for the protection of neutral commerce at sea rested on any basic principles of international law, but merely represented a compromise between the mutually exclusive demands of neutral and belligerent interests as sanctioned by custom and agreement.

As those familiar with the subject know, the two principal concessions hitherto agreed upon were that "a neutral flag covers enemy goods, except contraband of war," and "neutral goods, except contraband of war, are not liable to capture under an enemy flag." Both of these concessions proved worthless on account of the exception of contraband of war in each case. In the World War it was found that practically all exported articles could prop-

erly be listed as contraband of war and that the earlier distinction between absolute and conditional contraband, and the hitherto recognized condition that the contraband character of goods depended on proof of their ultimate destination by continuous voyage to enemy uses had lost any practical protective value against maritime seizure. On these issues, accordingly, "Command of the Seas" overcame "Freedom of the Seas."

So also "Command of the Seas" overcame the partial protection hitherto accorded to seaborne commerce against an ineffective blockade at sea, because although an effective blockade was impossible on account of shipments through neutral channels and the menace of submarine attack against blockading surface forces, nevertheless British command of the seas, with the acquiesence of the principal neutral Powers, secured the substitution of a blockade at the source of supply instead of a blockade at sea. By a variety of indirect means, not resting on the sanction of international law, but rather on British command of the seas, arrangements were entered into for the rationing of five neutral European states, and during an entire year before the United States entered the war every shipment of every commodity from neutral America to neutral European states adjacent to Germany was liable to seizure on the high seas unless shipped under a British "letter of assurance."

The British Labor Party, however, apparently realizes that the British command of the seas during the last war might have been challenged and destroyed by the neutral Powers if it had not been so skillfully exercised as to secure their passive acquiesence, instead of arousing their active resistance. It is also recognized that British command of the seas did not extend below the surface, and that their own commerce and importations were threatened with extermination by the deadly menace of submarine attack.

Looking to the future, the British Labor Party foresees that the peculiar combination of circumstances which made British command of the surface seas a decisive factor in the World War is not likely to be reproduced in any future war. There is also another probability to be faced, and that is that unless the command of the seas by Great Britain is voluntarily replaced by the freedom of the seas for all nations, belligerents as well as neutrals, their own national security will be in jeopardy.

The menace of submarine and air forces has already destroyed the British command of the seas for the protection of their own supply routes adjacent to the British Isles, and the loss of their surface command of the high seas is threatened, whether or not they invite competition in the construction of naval armament.

In view of these circumstances the British Labor Party frankly announces that: "It believes that, on technical grounds, we have nothing to gain by conserving blockade as a private weapon; and that on moral and political grounds, we have much to gain by completing its renunciation."

The considerations which induced this unqualified reversal of traditional

British policy can best be shown by quoting the following extracts from the Labor Party's campaign pamphlet, which states their case with great frankness:

> It must be remembered, too, that whilst modern technical developments have tended to make blockade *less* effective as a weapon against a *continental* state, such developments have tended to make it *more* effective against an *island* state. The submarine weapon was only in its infancy during the last war; yet even then, between April and July, 1917, a few dozen submarines ruthlessly used brought this country within close sight of starvation. Today the submarine is a weapon immensely more powerful than in 1917, and the aeroplane is rendering obsolete the old ideas of naval war and commerce protection.
>
> If any country in the world now stands to gain by the abolition of private blockade, it is our own industrial island, dependent on imports and exports, and still the greatest of sea-faring and sea-trading states.
>
> * * * * *
>
> Thus there is less ground than ever before for supposing that we could make a private blockade effective without rousing neutral opinion against us.

It might well have been added that although subsurface and aircraft forces could readily make a blockade effective against the British Isles, Great Britain could never again make a private blockade effective against a continental Power.

In recognition of this situation the Labor Party pamphlet goes on to say:

> If we tried today to use the weapon of blockade for our own private ends, we should certainly have to reckon with a protest far more emphatic that any made in the last war. How emphatic and serious was the protest of America in the last war is as yet too little realized in this country. And that protest could now be made far more effective than in 1915; so effective, indeed, that in face of determined American opposition the weapon of private blockade would almost certainly have to be laid aside.
>
> On political grounds then the case for completing the renunciation of the weapon of private blockade is newly strengthened.
>
> Lastly, consider the moral and legal obligations of a state bound, as we are bound, by the Covenant and the Kellogg Pact—bound, that is to say, to treat international peace as a matter of common, not private, concern, bound to share in common responsibilities for the maintenance of peace, and bound never to seek a solution of disputes except by peaceful means. Would it not be intolerable that a state so bound should close international seaways as a means of coercing its private enemy.
>
> * * * * *
>
> Thus on political and technical grounds, we should have no cause to regret the complete renunciation of blockade as a private weapon: on political, technical and moral grounds, as an Island Power, as the greatest of sea-traders, as a member of the League, and as a signatory of the Kellogg Pact, we should be the first to welcome that renunciation.

In conclusion, therefore, the British Labor Party, now speaking as the British Government, makes a virtue of necessity and announces that it does

not consider that any of the belligerent practices of a state which begins a private war should be regarded as legitimate, and holds that the development and codification of international law should be made on the assumption that private war and private blockade, instead of being a legitimate exercise of national sovereignty, is an international crime.

Accordingly, what the present British Government desires, as stated by an unofficial spokesman on their behalf, at the recent Williamstown Round Table Conference, is that an international agreement should be entered into renouncing the right to declare a blockade against a private enemy, in distinction from the right of the League of Nations to declare a blockade against a Covenant breaker as a public enemy. Such an agreement would permit, at the same time, the reduction of sea power to sea police as a basis for general parity of naval armament. It is also insisted that, concurrently with the renunciation of the right of private blockade, the United States should exclude from its conception of the "freedom of the seas" the right to furnish the sinews of war to a public enemy or Covenant breaker, which right should be renounced.

The alternative is stated to be that the United States must assume "command of the seas" for the preservation of peace, just as Great Britain did a century ago.

CHANDLER P. ANDERSON.

GERMANY AND THE CRIME OF THE WORLD WAR

The tenth anniversary of the signing of the Treaty of Versailles has passed almost without notice save in the countries whose defeat and punishment it decreed. Significant as were certain of its provisions for the general reorganization of international relations and for the larger development of international law, they have been overlooked in concentration upon those clauses of the treaty that have affected the destinies of individual states. To the victors the benefits conferred by the treaty have been so far short of the losses incurred by the war as to give little cause for commemorating the signing of the document. It is by the vanquished that the day is remembered as marking a fateful occasion.

On the morning of June 28th the German Government issued a manifesto protesting once more against the provisions of the treaty. The manifesto reads as follows:

> To the German people today is a day of mourning. Ten years have passed since the German peace emissaries at Versailles were forced to sign a document which to all friends of justice and true peace was a bitter disappointment.
>
> The ten years of this treaty have been a burden on all classes of the German people, on intellectual and economic life, and on the labors of the workman and the peasant. Tenacious and strenuous work with harmonious coöperation of all classes of the German people have been

needed to avert at least the gravest effects of Versailles which threatened our Fatherland's existence and placed the economic prosperity of all Europe in jeopardy.

Germany signed the treaty without thereby acknowledging the German nation caused the war. This accusation continues to perturb our people and undermines confidence among the nations. We know we are in accord with all Germans in rejecting the assertion that Germany was solely responsible for the World War and in the firm belief that the future belongs to the ideal of true peace not based on compulsion but only on an agreement of honest conviction of free and equally privileged nations.

It would seem that it is the view of the German government that the only hope of modifying the territorial arrangements of the treaty and of lightening the burden of the reparations imposed in pursuance of its provisions lies in an attack upon what it considers the fundamental assumption of the treaty, namely, that Germany alone was guilty of the crime of bringing on the war. This attitude appears not only in the official position taken by the German Government on public occasions, such as the present one, but forms the central theme of numerous articles and treatises by German writers. It is argued that responsibility for the material results of the war and the moral guilt of having brought it on are inseparable; that the one can only be justified upon the assumption of the other, and that if the assumption be unfounded then the decisions taken upon the basis of it must be reversed. Moreover, in addition to the alleged connection between the guilt of the war and the penalties imposed by it, there is the resentment by Germany of the imputation of a moral stigma upon her national character, and this resentment would appear to be all the more keenly felt in proportion to the earnestness of the belief of high-minded Germans that Germany must play a leading part in building up the new world of peace and coöperation. The two positions are quite distinct in motive, the first being an argument against the penalties imposed by the treaty, the second being a repudiation that the German nation should continue to appear in the light of an international criminal.

In one respect the stand taken by Germany is well founded. While Article 231 of the Treaty of Versailles is primarily concerned with imposing liability for the effects of the war, it indirectly raises the issue of war guilt. After fixing upon Germany and her allies the responsibility "for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected," Article 231 goes on to describe such loss and damage as being "a consequence of the war imposed upon them (the Allied and Associated Governments) by the aggression of Germany and her allies." Taken at their face value, these terms would seem to carry a connotation of sole responsibility for the war, and doubtless such was the conviction of the Allied and Associated Governments at the time.

It is submitted, however, that the imputation of moral guilt and of

criminal responsibility is not a necessary conclusion from Article 231. What the Allied and Associated Governments were principally concerned with was the imposition of indemnities for the losses incurred by the war, and here Germany is made the responsible party. The ascription of those losses to a war brought on by the aggression of Germany reflects the temper of the times, but it can not be taken as a fundamental assumption upon which all the provisions of the treaty rest. Germany was defeated, and that was all there was to it. The naïve attempt to make Germany sign up to her own guilt was not taken seriously by the victors and need not be taken seriously by the German people. At any rate, when the German delegates announced that they were signing the treaty under duress no one suggested that at least they should be sincere about acknowledging their guilt.

It is well to remember that in the year 1914 there was no clear basis upon which the moral responsibility for a particular war could be judged. The distinction between aggression and defense was not marked by any clear line. Indeed, defense might readily take the form of anticipation of attack and so become justifiable aggression. Security was at best precarious, and there was no telling what slight shift in the balance of power might not spell ultimate doom. The representatives of the victorious nations in 1918 were quite aware that in the complicated diplomatic negotiations leading up to the war there were provocative moves for which Germany was not responsible. Liability was imposed upon her because of the decisive act which set in motion the forces that ultimately led to the fatal result. Germany was made responsible *de facto* because it was believed that her action was the dominant action under the circumstances. "It is this sort of effective responsibility," says Professor Potter, "that creates liability in any known system of criminal law or governmental practice; nowhere is such an imaginary thing as sole responsibility required as a bases of liability."[1] While Germany may repudiate the judgment passed by the victors in their own case, she need not, and cannot fairly, taking the circumstances into account, read into it the moral indictment she so greatly resents.

The truth is that in the ten years that have passed since the signing of the treaty, the enlightened public opinion of the world has become more and more convinced that there can be no indictment of a single nation as the sole cause of the war and the sole bearer of the criminal guilt attached to it. Yet it is quite compatible with such a conclusion as to the moral aspects of the great catastrophe that there should be an assessment of legal responsibility and material damages against Germany as being the leading party among the defeated allies. For the war was fought under the old order of things; it was resorted to as the accepted *ultima ratio* in a system of international relations that recognized the right to make war and put but the most illusive restraints upon the exercise of that right. The consequences of defeat were then, as in earlier wars, that the losing party should pay the indemnities. *Vae victis.*

[1] This JOURNAL, Vol. 23 (1929), p. 504.

In losing the war Germany thus lost the stakes of a battle fought according to the old standards of diplomacy. President Wilson's conception of a just and permanent peace may have mitigated the penalties imposed; but such as were imposed were imposed because the victors had the power to impose them. That Germany should consider them unjust and oppressive is but to be expected, and few will deny that certain of them must be considered so. But in the assessment of penalties against Germany there need be no question of the moral guilt of the German nation carrying with it a stigma for the future. The past ten years have taught us that greater than the indictment against Germany is the indictment against the system under which such things were possible. The supremacy of self-defense, the unstable equilibrium of alliances and counter-alliances, the absence of restraints upon individual action, the right of each to be the judge in his own case—all these and other characteristics of the old anarchy make it difficult to condemn too rigorously the nation which in a grave emergency took action not unlike that taken by others in the past, if more fateful in its consequences.

Upon two points there should be general agreement. Whatever the degree of responsibility to which Germany was held in 1919, there must be revision of such terms of the treaty as in the passing of the years have proved to be unwise and unjust from the point of view of the general peace and welfare of the European community, of which Germany is one of the leading members. Doubtless, it will be difficult at any time in the near future to undertake a formal revision of the Treaty of Versailles, but informal revision of particular provisions not only can be effected but is now actually being carried out. Nothing could be more hurtful than to permit the continuance of unjust conditions simply because they were believed to be just under the tense circumstances under which the Treaty of Versailles was signed.

Secondly, the best assurance that the German people can have that the "war guilt" theory is not, as they claim, "undermining confidence (in them) among the nations" will not come in the shape of a formal withdrawal of the alleged accusation that Germany alone caused the war, but will come, as it has been coming for the past few years, in the actual coöperation of her former enemies with Germany in the task of building up the new world of the future.

The withdrawal of the charge of "war guilt" can best be expressed in conduct. To attempt to formulate it in words would only reopen old wounds. What is more important than the cancellation of Article 231 is the common conviction by the signatories of the Treaty of Versailles that the tasks to be achieved by coöperation in the future are of such far-reaching importance as to make the assignment of responsibility for the war, and even the war itself, negligible by comparison. When the influence of the new Germany has long been felt in the councils of the nations and her voice has been heard consistently on the side of justice and law, the question of "war guilt" in 1914 may be discussed by those who have no more practical tasks at hand.

C. G. Fenwick.

THE TARIFF AS A MATTER OF INTERNATIONAL CONCERN

The announcement made on July 10, 1929, that the Department of State had received representations from thirty-eight foreign governments against particular tariff measures contemplated by Congress has drawn attention to the status of tariff legislation in the international relations of states. It is, of course, neither new nor strange that proposed or enacted tariff legislation should be the subject of diplomatic correspondence or complaint. Foreign governments, upon innumerable occasions, have drawn the attention of the United States to the injuries which would be suffered by their nationals or by their domestic and foreign commerce in general by the imposition of specified rates of tariff upon specified goods the products of or manufactured in the particular country.

The occasions upon which the United States has made representations of this character to foreign governments are perhaps less in number but the terms of the correspondence have been no less vigorous. In 1874, for example, representations were made to Brazil that proposed tariff legislation affecting goods of American origin would greatly reduce trade between the two friendly countries; that Brazil had given no recognition to the reduction of duties upon the importation of coffee into the United States, this being the chief item of Brazilian export; that a favorable tariff on United States products would "strengthen and make lasting the very friendly relations and commercial alliance between the two principal powers on the American continent".[1]

In 1885, Secretary Bayard instructed the American Minister to the Netherlands to protest against a proposed increase of the duty on petroleum imported into the Dutch East Indies. He was instructed to urge that such duties could not be protective in character because there was no native production of petroleum and no imports of a similar character from the mother country; that the proposed legislation could not be deemed fiscal as it practically excluded all importation; that for these reasons the proposed duty must be deemed to be one "leveled directly against trade interests of the United States."[2] In reporting upon the execution of these instructions, Minister Bell admits having said that the projected legislation presented to the United States "the impression of an unfriendly act." The written protest left with the Government of the Netherlands did not repeat this phrase *in haec verbis*, but went so far as to say that "to level a blow at so important an article of export as petroleum is to the United States, must create a prejudice against the nation that struck the blow and may lead to serious embarassment in the commercial relations of the two countries."[3]

In 1897, Ambassador Porter, under instructions from the Department, characterized certain proposed French tariff legislation on meat products not only "unjust, as leading to the destruction of an important branch of

[1] U. S. Foreign Relations, 1874, p. 87. [2] U. S. For. Rel. 1886, p. 734.
[3] *Ibid.*, p. 737.

commerce" between the two countries, but also "unfriendly in its character" because discriminatory.[4]

Diplomatic representations bearing upon foreign tariff legislation, in the absence of any treaty rights, cannot be founded upon the breach of an international obligation. Their justification lies rather in what Martens described as "the privilege of a foreign friendly nation to complain and remonstrate against such acts of sovereignty as are injurious to its citizens and subjects." [5] Grotius draws the distinction between what we today would call the denial of access to raw materials, or, as he put it, "the cutting off from men the communication of the goods of their common Mother," which he referred to as an imperfect right, and the presumed right to sell goods abroad without hindrance, which he considered not to be a right at all.[6]

The school of natural-law writers of the eighteenth century accepted this distinction as well founded. Vattel, for example, paraphrased the doctrine of Grotius and then enlarged upon it as follows:

> Consequently every state has the right to forbid the importation of foreign goods; and the nation which is thus prohibited has no right to complain, as if it had been refused an office of humanity. The complaint would be ridiculous, since the only object of the sellers would be profit, and the nation which lays the prohibition is not willing that another should profit at its expense. . . . A nation, then, has no natural right to sell its goods to another nation which does not wish to buy them; it has only an imperfect right to buy from others what it has need of, and it is for these others to decide whether they are in a position to sell or not; and finally, commerce consists in the reciprocal purchase and sale of all sorts of commodities. Hence it is clear that it is for each nation to decide whether it will carry on commerce with another or not. If it wishes to allow commerce with a certain nation, it has the right to impose such conditions as it shall think fit; for in permitting another nation to trade, it grants the other a right, and every one is at liberty to attach such conditions as he pleases to his voluntary concessions.[7]

Vattel remarks that only in the event that measures of exclusion are taken having no relation to the welfare of the state, would a foreign nation have a right to complain of such conduct as an unfriendly act. Ordinarily, therefore, the rights and privileges of commerce must be obtained by agreement or treaty.

From the standpoint of international law, these principles are orthodox today just as they were two centuries ago. Yet the mounting importance of economic questions in international relations, due to the modern way of life and to the liquidation of the World War, has given the tariff somewhat of an international status. However much the legal nature of tariff legislation is

[4] U. S. For. Rel. 1897, p. 133.

[5] Martens, *Droit des Gens*, bk. 3, ch. 3.

[6] Grotius, *De Jure Belli ac Pacis*, bk. II, ch. II, 18–20.

[7] Vattel, The Law of Nations or the Principles of Natural Law, Vol. I, Bk. I, Chap. VIII. Classics of International Law. Fenwick's translation.

recognized, its actual effect upon international relations rises up like Banquo's ghost, to use a phrase of Signor Pirelli. At the meeting of the International Chamber of Commerce held at Amsterdam in July, 1929, Signor Pirelli referred to tariff legislation as "a matter of national sovereignty." Indeed all collective action upon the question was ruled out as not within the purview of the conference; and yet he could not ignore that "the effect of measures taken will be proportionate to the importance of the countries that take them and for this reason the attitude of the great industrial countries, and therefore of the United States of America, deserves our special attention." [8]

Mr. Stresemann, in reporting to the Council of the League of Nations the results of the International Economic Conference held at Geneva, May 4 to 23, 1927, under the auspices of the League, remarked that "Commerce is, *par excellence*, a matter of international concern." The main conclusion drawn by the League's committee from the work of that conference in the field of commercial policy was "that the time has come to put a stop to the growth of customs tariffs and to reverse the direction of the movement by an effort made along three lines, viz., (1) Individual action by states with regard to their own tariffs; (2) Bilateral action through the conclusion of suitable commercial treaties; (3) Collective action by means of an enquiry, with a view to encouraging the expansion of international trade on an equitable basis by removing or lowering the barriers to international trade which are set up by excessive customs tariffs." [9]

Participating in the conference at which these conclusions were arrived at, there were present by designation of the United States, the Undersecretary of State, the Director of the Bureau of Foreign and Domestic Commerce, an economic adviser to the Department of State, the chief of the Research Division of the Department of Commerce and the president of the United States Chamber of Commerce. The final act of the conference recognized that though tariffs were "within the sovereign jurisdiction of the separate states, (they) are not a matter of purely domestic interest but greatly influence the trade of the world." [10]

We are of course a long way from the period when tariff legislation will constitute a matter of international grievance in the strict sense, in the absence of treaty provision. The methods of international intercourse have so changed, however, that the time may not be far distant when no nation may completely ignore the substantial economic claims of the other nations of injury to the normal currents of trade through tariffs or other economic barriers. The access to raw materials to be obtained only abroad is often a vital need for countries most anxious to protect their home markets by tariffs. Furthermore, the ability of a country to purchase is now closely associated

[8] Commerce and Finance, July, 1929, p. 1572.
[9] Report and Proceedings of the World Economic Conference. Geneva, May, 1927, p. 39.
[10] *Ibid.*, p. 41.

with its ability to sell its products abroad; so that the distinction made by Grotius has lost much of its significance. International combines and cartels, some of them directly fostered by governments, are encouraged to take measures for the purpose of combating the evil effects of foreign tariffs on domestic industry. A sincere desire to promote friendly international relations is often thwarted by the existence of economic barriers. Senator Walsh of Massachusetts has recently recognized that "world peace may be jeopardized by extreme and selfish economic policies. Mere absence of war does not mean peace. There is no real peace when nations are growing increasingly suspicious of each other and are contending with each other in bitter economic rivalry across international boundaries."[11]

All these considerations tend to give an international status to tariff problems, notwithstanding the lack of any basis for international complaint *strictissima jure*. The economic relations of peoples often come nearer to the realities than their treaty arrangements in appraising their progress toward permanent peace.

ARTHUR K. KUHN.

THE INTERPRETATION OF TREATIES

Mr. Fachiri, the eminent English barrister-at-law, in his illuminating article on the "Interpretation of Treaties" published in this issue of the JOURNAL, dissents from the point of view expressed in an editorial on this subject in the April number of the JOURNAL for the current year concerning the value of extrinsic evidence showing the intention of the parties to a treaty. Quoting from Sir Frederick Pollock he holds:

> It would be contrary to general convenience and in a great majority of cases to the actual intention of the parties, if oral evidence were admitted to contradict the terms of a contract as expressed in writing by the parties. Interpretation has to deal not with conjectured, but with the manifest intent, and the supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded.

Fortunately, there are substantial and significant points of agreement between the positions taken respectively by Mr. Fachiri and the writer of the editorial cited. Mr. Fachiri admits that "until recently" it has been the common practice of international tribunals to roam at large among a mass of extraneous material "for the purpose of discovering the supposed intention of the signatories of treaties" (*supra*, p. 747). He also states that he does not mean "to exclude the consideration of the historical circumstances leading up to the treaty, which can, and indeed must be looked at to explain the 'mischief' or purpose aimed at and the terms agreed upon, but in my view this is the only material outside the text that is properly admissible." He further concedes that "the Supreme Court of the United States has shown a

[11] Annals of the American Academy of Political and Social Science. July, 1929, p. 71.

disposition to adopt a somewhat looser method of interpretation" (p. 752), and he recognizes that the principle favored by the writer of the editorial cited "undoubtedly has the support of eminent Continental jurists but it has always been strenuously opposed by English legal opinion" (p. 745).

Mr. Fachiri adduces in support of his thesis what he considers to be the tendency of recent advisory opinions of the Permanent Court of International Justice to apply the principle that "preparatory work should not be used for the purpose of changing the plain meaning of a text." He summarizes this tendency as follows:

> I think it is incontestable that the court has adopted the principle that international agreements must be interpreted by reference to their actual terms, without having regard to the negotiations or other *travaux preparatoires*. The only qualification is that the text must be "sufficiently clear" to enable this to be done. If this condition is present, the court will reach a conclusion upon the text itself, and I submit that it follows from the reasoning of the decisions that even if the *travaux preparatoires* contained matter inconsistent with the final text, the conclusion so reached would hold good.
>
> Moreover the court does not restrict the scope of the conception of a "clear" text within narrow limits. It does not mean a text as to the interpretation of which there is no doubt or difficulty, but, if I may venture a gloss, an *intelligible* text (p. 752).

Referring to the extracts cited by Mr. Fachiri from these advisory opinions, it may be pointed out that the court was careful to qualify its position by speaking of "a text which is sufficiently clear in itself" (p. 16), as Mr. Fachiri recognizes, and that furthermore the court did not by any means exclude the consideration of extrinsic evidence as to the intention of the parties, but rather sought as far as possible to find that intent embodied clearly in the final text of the agreements. In other words, the court properly indicated its preference for the actual terms agreed upon though ready to consider, if necessary, any extrinsic evidence which might serve to elucidate those terms.

The issue would thus seem narrowed down to a difference of opinion concerning the desirability of a generous, liberal attitude on the part of an interpreter of treaties towards all extrinsic evidence which may throw light on the intent of the parties, even in the case of text which may seem "sufficiently clear" and "intelligible," whether etymologically or rationally. An examination of the authorities on Evidence cannot fail to show that there is a practical unanimity in their recognition of the ineluctable necessity of extrinsic evidence to disclose the intent of the parties to written legal transactions. The main divergence in their positions would seem to lie in their respective evaluation of "manifest intent," whether it is to be sought in a limited, restricted sense in the text itself, or freely and liberally outside of the text. Mr. James Bradley Thayer, in his valuable treatise on Evidence (p. 580) cites with approval the views of F. Vaughan Hawkins, Esq.:

It is necessary in the first place to distinguish that which takes place in the interpretation of a legal writing, such as I have mentioned, from that which takes place in the interpretation of written language in the most general form. In the latter case the object is a single one—to ascertain the meaning or intention of the writer—to discover what were the ideas existing in his mind, which he desired and endeavored to convey to us. "*Interpretatio est collectio mentis ex signis maxime probabilius,*" is the definition of Grotius. It is a collecting of the intent from the most probable signs or marks. The intent of the writer, the ideas existing in his mind, cannot be known to us with certainty: we can only ascertain them to a greater or less degree of probability from outward marks or signs. The language used is one set of marks or signs, whose office it is to convey the writer's meaning; but interpretation, in its most general form, is not restricted to the consideration of the single set of signs which language is, still less is it debarred from giving to those signs any meaning, however discovered, which may accord with the possible or probable intention of the writer. To collect the intent is the sole object of inquiry; and the language, the written expression, is valuable only as a mark or sign of intent, a medium through which it may be collected.

In the interpretation of a legal document, however, we have not indeed a different, but an additional, object of inquiry. We desire not solely to obtain information as to the intention or meaning of the writer or writers, but also to see that that intention or meaning has been expressed in such a way as to give it legal effect and validity; we desire, in short, to know what the writer meant by the language he has used, and also to see that the language used sufficiently expresses that meaning. The legal act, so to speak, is made up of two elements,—an internal and external one: it originates in intention, and is perfected by expression. Intention is the fundamental and necessary basis of the legal effect of the writing; expression is the outward formality annexed by the law, both as a condition proper to ensure due deliberation in the performance of that which is to operate by force of law, and also as a means of securing that the act itself shall be properly evidenced and authenticated. The law, I say, requires a sufficient, not a perfect, written expression. This question will have presently to be considered more in detail; for the present I assume it to be so. To the general object of inquiry, therefore, there is superadded, in the interpretation of a legal writing, the further object of seeing that there is sufficient expression of the intent contained in the writing before us. The language or written expression is therefore valuable in a twofold sense. Towards the collecting of the intent it is, as before, valuable as a mark or sign, though not necessarily the only, or even chief mark or sign, but it may be one among many; it is, secondly, valuable in and by itself, as a condition of legal validity, essential to give effect to the intention. To interpret a legal writing is, therefore, first to collect the intent, to discover the writer's meaning; secondly, to ascertain that that meaning is expressed sufficiently.

The American and English Encyclopedia of Law contains the following observations on Parol Evidence with reference to "the condition of the parties and surrounding circumstances":

He who interprets should as far as possible put himself in the position of the parties at the time the writing was executed. This is only

> another way of saying that the intention of the parties should govern. Regard must be given to the occasion which gave rise to it, the relative position of the parties, and their obvious designs as to the object to be accomplished. But if the meaning and intention of the parties cannot be ascertained from the language of the instrument when thus illustrated, it is void for uncertainty. When there are two interpretations, that one will be followed which is consistent with the conduct of all the parties. In all cases attention should be given to the subject matter in the light of contemporaneous facts and circumstances.

In the light of the foregoing it would seem logical, equitable, and inevitable that in order to ascertain the clear intent of the parties to a legal writing, whether it be a will, a contract, a statute, or an international agreement, recourse should be had to all extrinsic evidence which may aid the interpreter. It is not enough even that the text should be "intelligible," that its meaning should seem "sufficiently clear." The interpreter is bound to seek to discover the meaning of the terms used as understood by the negotiators and contracting parties. Such meaning is obviously not "sufficiently clear" until he is certain that it embodies their intent. The text is not sacrosanct as the unchallenged expression of such intent. It is only the vehicle for conveying the intent and may prove to be a most unsatisfactory vehicle. This, of course, is not to say that preference should be given to extrinsic evidence, or to deny that preference should be given to the text to be interpreted. It is merely the recognition of the inherent necessity of doing justice by making certain that the intent of the parties has been expressed in the text and not distorted or nullified.

In the case of international agreements this necessity would appear all the more urgent. The moment that a nation challenges the correctness of an interpretation of its commitments under a treaty it would seem in accordance with the dictates of reason, of equity, and of prudence to ascertain the grounds for its position. The interpreter may not properly ignore any evidence which may be adduced, whether of protocols of conferences, memoranda of discussions, diplomatic correspondence, or even of personal declarations by the negotiators, as well as statements by authorities competent to ratify negotiated instruments. The intent and the clear understanding of that intent, whether by one or all the parties concerned, is everything. If there be any doubt on the subject, that doubt must be removed before justice can be accorded. The nation raising such doubt may be found to be in the wrong, but the essential fact is that uncertainty concerning its intent cannot be removed until evidence extraneous to the text has been duly considered. Such has been unquestionably the uniform practice observed by international tribunals, as was maintained in the editorial cited from the April issue of this JOURNAL, and as admitted by Mr. Fachiri himself. The desirability of abandoning this principle would not seem apparent. To place nations on a procrustean bed of a narrow, rigid legalism would do great injury to the interests of international justice and of peace among nations.

The law of nations is founded on common consent freely given. It has sanctions quite different from that of municipal law. It demands a generous, liberal interpretation. It does not permit of arbitrary methods or of coercive measures. A treaty, unlike a contract, does not afford its own penalties. Its observance and enforcement depend on the maintenance of mutual confidence and respect among nations. Divergent views must be submitted to processes of equitable conciliation rather than to the constraints of legal restrictions. The intent of nations is of fundamental significance and that intent may not fairly be deduced from legal documents alone. No nation can reasonably or honorably agree to more than it can fulfil, and written engagements would be abhorrent unless they were interpreted in the most liberal manner. Surely "the letter killeth" in international affairs as certainly as in other human affairs.

Nowhere would this seem more evident than in the very case of the General Pact for the Renunciation of War which gave rise to the present discussion. The lofty intent of this instrument to abolish war would seem apparent, and yet a closer scrutiny of its terms reveals the possibility of profoundly divergent interpretations of its obligations and of its benefits. Novel terms are introduced requiring definition by those who negotiated the Pact. What is war "as an instrument of national policy"? Does it mean only deliberate recourse to violence in order to carry out a consistent state policy such as Bismarck followed? Does it preclude the use of force under the Monroe Doctrine? Does it permit the "protection" of national interests from mob violence in troubled areas of the world? Does it permit the employment of force as a measure of self-defence in anticipation of certain danger? The Pact states that "the settlement or solution of all disputes or conflicts, of whatever nature they may be, which may arise among them, *shall never be sought except by peaceful means.*" What is the meaning of this circumlocution? If the parties meant to renounce all war forever, why did they not say so in just so many words? Why this attenuated form which might well imply that while they would not deliberately seek the settlement of disputes by violence, war might still ensue in spite of all their good intentions? Again, in the preamble occurs a singular phrase which has been held by some of the more ardent friends of the Pact to be the heart of the whole instrument: "any signatory Power which shall hereafter seek to promote its national interests by resort to war should *be deprived of the benefits of this treaty.*" Is this really a concealed sanction, a threat against any nation which may be accused of violating the Pact?

In view of the novelty of the terms employed and the peculiar phraseology of this momentous agreement, it is not strange that the contracting parties should have felt under the necessity of seeking clarifications of its meaning and of recording in the *travaux preparatoires* not merely their respective understandings of its meaning, but also their reservations concerning their rights and obligations under the Pact. If all this were "implicit

in the text of the Pact itself," as held by Mr. Fachiri, why then the necessity for all these laborious negotiations? Were these statesmen really indulging in futile questionings and alarms? If so, who was able to allay their fears? Obviously, someone must have interpreted the Pact in such a way as to give satisfaction. Is this interpretation an idle one because the text is "sufficiently clear"? Or must this interpretation be taken into account judicially whenever a nation which is to be "deprived of the benefits of this treaty" may challenge the justice of the interpretation placed by the other nations on its action? The logic of the situation would seem inescapable, namely, that extrinsic evidence of the intent of the parties to the Pact for the Renunciation of War is of infinitely more importance than the text itself. And it may well be found that the collecting of this intent will lead to a comprehensive survey of all of the *travaux preparatoires*, including not merely the recorded diplomatic correspondence which accompanied the Pact when ratified, but also the statements, declarations, and comments of responsible officials directly implicated either in the negotiations or in the procedure of ratification.

The writer of this editorial comment has the deepest respect for the erudition and legal acumen of Mr. Fachiri, but for the reasons outlined above he is unable to see how it is possible to reach any other conclusions than that international justice and peace require that the intent of nations must be discovered in the spirit as well as in the letter, and that it would be destructive of the great ideal of the Kellogg Pact if it were subjected to the constraints of legalistic interpretations of a restricted nature. The intent is manifestly generous: so also should be its interpretation.

PHILIP MARSHALL BROWN.

THE INTERPRETATION OF TREATIES BY THE SUPREME COURT OF THE UNITED STATES

The conclusions of the Supreme Court of the United States concerning principles and methods of interpreting treaties are always important. Two recent decisions in which the views of an undivided court are expressed through Mr. Justice Stone are of special interest.

In the case of Jordan *v.* Tashiro,[1] decided November 19, 1928, the question arose whether Japanese nationals were entitled to construct and operate a general hospital, embracing a home for nurses and resident physicians, and to lease land for such purposes, and to exercise such privileges through an appropriate corporate agency, in the State of California, by virtue of the existing treaty of commerce and navigation between the United States and Japan.[2] The court, affirming the conclusions of the Supreme Court of

[1] 49 S. Ct. 47.

[2] According to Article I: "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and

California, was of opinion that those nationals were entitled under the treaty to such privileges. Declaring that the question presented was one touching the construction of a treaty, the court said that

> The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred.[3]

In thus imputing to the contracting parties a design to attach a broad signification to the terms of their choice, the court appears to be actuated by the belief that, in the absence of evidence to the contrary, the requirements of good faith leave no alternative. This amounts to a presumption merely as to design. The requirements of good faith are never lacking. They entail, however, no such consequence when the presumption is rebutted. Thus in case the fact be established that, notwithstanding the language employed, the contracting states used the words of a treaty in a narrow sense, or with the design of not yielding thereby a privilege which a fairly broad construction might well embrace, the reason for a liberal interpretation vanishes. In the present case the Supreme Court happily adverted to one of its earlier decisions interpretative of the same article of the same treaty with Japan where "the circumstances attending the making of the treaty" were "deemed to exclude from the operation of its broad language any grant of the privilege of acquiring and using lands within the United States for agricultural purposes."[4] In the present case, however, the task of the court was to construe the comprehensive words "trade" and "commerce" employed in the treaty without evidence that the United States and Japan had undertaken to employ them in a sense which failed to embrace the privileges which the respondents sought to exercise. Under such conditions it was declared that the court felt itself "required by accepted principles" to give to the terms of the treaty a "liberal rather than a narrow interpretation."

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shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. . . .

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects. . . ."

[3] The court cited Geofroy *v.* Riggs, 133 U. S. 258, 267; Tucker *v.* Alexandroff, 183 U. S. 424, 437; Wright *v.* Henkel, 190 U. S. 40, 57; *In re* Ross, 140 U. S. 453, 475; Asakura *v.* Seattle, 265 U. S. 332. See also Olsson *v.* Savage, 240 Pac. 586.

[4] Terrace *v.* Thompson, 263 U. S. 197, 223. Webb *v.* O'Brien, 263 U. S. 313, 323, and Frick *v.* Webb, 263 U. S. 326, 333, were also cited.

Inasmuch as contracting states are free to employ terms in any sense they see fit, and sometimes contemplate the use of one not apparent on the face of the instrument, the task of interpretation necessarily involves a broad inquiry into the facts. The fruits of such an inquiry not infrequently reveal a common design which those who drafted or negotiated a treaty lamentably failed to make clear in the final text.[5] Thus to interpret liberally the provisions of a particular convention may be to follow the ineptitude of poor draftsmen rather than to respect the actual design of the contracting parties.[6] Any technical rule impelling judges to do so might produce such a result. The Supreme Court in the present case is far from intimating that any rule fetters or thwarts the search for the exact idea which the words of a treaty are used to express, or that when that idea is by any process once ascertained, respect for it is to be subordinated to the operation of a particular canon of interpretation. Therefore the inclination of that tribunal towards the liberal construction of treaties must not be misconstrued. It is doubtless a leaning in a safe direction. It is respectful of the high purposes of the United States as a contracting party; it tends to minimize occasions for impugning the good faith of the nation. At the same time it marks no disposition to hamper the search for evidence or to disregard what that search may reveal.

The case of Nielsen *v.* Johnson was decided on February 18, 1929.[7] By a certain section of a statute of the State of Iowa, the estate of a decedent passing to his mother or other named close relatives, if alien non-residents of the United States, was subject to an inheritance tax of ten per cent, but by another section an estate of less than $15,000, as was the decedent's, passing to a parent who was not such a non-resident alien, was tax free.[8] The question arose whether the application of these provisions to the petitioner, a national of Denmark and resident within its territory, who was the mother and sole heir at law of the intestate decedent, a Danish national residing in Iowa at the time of his death, was void as in conflict with Article 7 of the treaty between the United States and Denmark of April 26, 1826, and renewed in 1857.[9] It was contended that this discrimination was not prohibited by the treaty since the tax was one upon the succession, and not

[5] There have been times when plenipotentiaries have had no zeal to make clear through the text of a treaty the full scope of sacrifices in fact agreed upon.

[6] In the course of the Eleventh Advisory Opinion of The Permanent Court of International Justice concerning the Polish Postal Service in Danzig, it was declared that: "In the opinion of the court, the rules as to a strict or liberal construction of treaty stipulations can be applied only where ordinary methods of interpretation have failed." Publications of the Permanent Court of International Justice, Series B, No. 11, p. 39.

[7] 49 S. Ct. 223.

[8] Sections 7315 and 7313, c. 351, Code of Iowa (1927).

[9] Article 7 declared that: "The United States and His Danish Majesty mutually agree that no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money, or effects, of their respec-

upon property or its removal which, it was asserted, was alone forbidden. The court announced that this narrow and restricted interpretation of the treaty was "not consonant with the principles which are controlling in the interpretation of treaties," which were, it was said, "to be liberally construed." The court, however, added other reasons which sufficed for the decision. These deserve attention.

The court declared that when the "meaning" of treaty provisions "is uncertain":

> . . . recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their own practical construction of it.

Acting on this principle, the court proceeded to examine and discuss the history of Article 7 of the treaty and the reference to it in diplomatic exchanges between the United States and Denmark. Attention was called to the diplomatic correspondence of Secretaries Adams and Clay prior to the final consummation of the treaty; and also to a note from Secretary Clay to the Danish *chargé d'affaires* of November 10, 1826, shortly after the ratification of the treaty, referring to the objects of the United States in obtaining the stipulations contained in the article. In the light of this data the court was satisfied that the purpose of the contracting states was to prohibit discriminatory taxes of the nature of the *droit de détraction*,[10] of which the provisions of the Iowa statute were deemed to be the substantial equivalent. The article of the treaty as thus construed was, therefore, necessarily held to prevail over the inconsistent Iowa enactment.

The design of the contracting parties, that is, the exact significance which

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tive citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money or effects, or otherwise, than are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state respectively."

[10] Declared the court: "The *droit de détraction*, referred to in the communication of Mr. Clay of November 7, 1825, and in the note of the Danish Minister of April 14, 1826, in which he identified that phrase with the tax prohibited by the additional article of the treaty between Denmark and Great Britain of June 16, 1824, similar in terms to the article now before us, was a survival from medieval European law of a then well-recognized form of tax, imposed with respect to the right of an alien heir to acquire or withdraw from the realm the property inherited. Although often referred to as a tax on property or its withdrawal, the *droit de détraction* seems rather to have been a form of inheritance tax, but one which, because of its imposition only with respect to property of aliens who normally removed it from the realm, was sometimes associated with the removal rather than the inheritance of the property. . . . Its origin and an examination of the commentators likewise leave no doubt that the *droit de détraction*—the tax—accrued upon the death of the decedent, and only after it had been collected was the heir entitled to take possession of the property and remove or otherwise dispose of it. It was thus the precursor of the modern inheritance tax, differing from it in its essentials solely in that it was levied only where one of the parties to the inheritance was an alien or non-resident."

they sought to attach to the words employed in their agreement, could not have been ascertained in more direct fashion. True sources of interpretation were drawn upon; and these furnished light that rendered it unnecessary to invoke the aid of any rule.

Arguments for and against the consideration of so-called "preparatory work" involved in the evolution of a convention have been made in certain cases before The Permanent Court of International Justice.[11] For special reasons set forth in its order of August 20, 1929, annexed to its sixteenth judgment, the court excluded certain preparatory work as evidence.[12] In other cases it has not reached a conclusion interpretative of a treaty which a majority of the judges deemed to be opposed to inferences to be fairly drawn from the preparatory work, or been confronted with a situation where such evidence demanded a conclusion at variance with inferences normally to be derived from the actual terms of a treaty. Nevertheless, the court has not hesitated to declare that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself," [13] and that "preparatory work should not be used for the purpose of changing the plain meaning of a text." [14]

The Supreme Court of the United States approaches the general problem in perhaps a simpler way. It does not comment on the relative value of various sources of interpretation; nor does it advert to the circumstances, if any, when it may be disinclined to rely upon or be influenced by some forms of evidence rather than by others. The methods employed in the case of Nielsen *v.* Johnson are not believed to have been unscientific or inadequate as a means of getting at the truth.

CHARLES CHENEY HYDE.

[11] Compare, for example, Additional Observations, by M. Albert Thomas, of July 20, 1922, touching the competence of The International Labor Organization in the matter which became subject of the Second Advisory Opinion, Publications of The Permanent Court of International Justice, Series C, No. 1, pp. 270, 274–281, with Additional Observations by M. de Lapradelle, of July 14, 1922, in the same case, *id.*, 182, 187–189.

The oral argument of Sir Douglass Hogg, October 26, 1925, in the case which was the subject of the Twelfth Advisory Opinion, is of interest. Publications of the Permanent Court of International Justice, Series C, No. 10, pp. 18, 20–22.

[12] Annex 3 to Judgment No. 16, in case relating to the Territorial Jurisdiction of the International Commission of the River Oder, p. 41.

[13] Case of *The S. S. Lotus*, Publications of The Permanent Court of International Justice, Series A, No. 10, p. 16. It may be observed that the court later declared in the course of its opinion that "The records of the preparation of the convention respecting conditions of residence and business and jurisdiction would not furnish anything calculated to overrule the construction indicated by the actual terms of Article 15." *Id.*, p. 17.

[14] Fourteenth Advisory Opinion concerning the Jurisdiction of The European Commission of the Danube between Galatz and Braila, Publications of The Permanent Court of International Justice, Series B, No. 14, p. 31. The court saw fit to add: "Moreover, the records of the preparation of the Definitive Statute do not, in the opinion of the court, furnish anything calculated to overrule the construction indicated by the actual terms of Article 6."

FINANCIAL ASSISTANCE TO STATES THREATENED WITH AGGRESSION

An interesting scheme for financial assistance to states, members of the League of Nations, which are "involved in war or threat of war" is provided for in a draft convention submitted to the Assembly of the League at its recent session (September, 1929). The convention was discussed by the Assembly, which asked the Council to take the necessary steps for the early establishment of a complete text which might be submitted to states for signature at the earliest possible date. The draft was formulated by the Financial Committee of the League with the collaboration of the Special Committee on Arbitration and Security, at the request of the Council and Assembly in September, 1928, and by direction of the Council was submitted in 1929 to the various governments of the states, members of the League, with the suggestion that they furnish their delegates to the recent assembly with instructions in regard to the action desired by them to be taken concerning the proposal. The basic idea of the scheme was first proposed by the Government of Finland in 1926, principally as a means of strengthening the feeling of security among states and, as a result, of facilitating the progress of the movement for reduction of armaments.

As is well known, Article 16 of the Covenant provides for collective action, economic, financial and military, against states guilty of aggression upon members of the League, although it does not define precisely the circumstances under which the obligation to participate in such measures arises. The Geneva Protocol of 1924 dealt more precisely with the matter, but for reasons well known that instrument never went into effect.

The form of economic assistance provided for by the proposed convention differs from that contemplated by Article 16 of the Covenant in that it consists of positive aid in the form of advances of money or credit, extended directly to a state to enable it to repel by its own action the aggression of which it is a victim or with which it is threatened, whereas the latter is rather indirect in character, consisting as it does, of collective measures in the form of nonintercourse, boycott or blockade, directed against the actual or potential aggressor with a view to deterring him from attempting to carry out his designs or preventing him from carrying out effectively an aggression once begun. The latter may also be regarded as measures of an exceptional character to be resorted to only when financial aid to the victim proves insufficient to deter the aggressor or to enable the victim to repel the aggression himself.

The extension of financial assistance to the victim of an aggression is, of course, not intended to be a substitute for the sanctions of Article 16 of the Covenant but rather supplementary to the latter. The idea is that the knowledge on the part of the potential aggressor that his victim is assured of prompt and adequate financial assistance, may be sufficient to deter him from attempting to carry out his designs, or, if not, the aid placed at the disposal of the victim may enable him to resist effectively an aggression already

begun. In case, however, it produces neither of these results, the sanctions of Article 16—non-intercourse, boycott, economic blockade and, if necessary the employment of military force—remain available and may be resorted to by members of the League to accomplish the object which the extension of financial assistance to the victim proved insufficient to accomplish.

In brief, the mechanism of the scheme of financial assistance is as follows: The parties to the convention undertake, each in proportion to its quota of expenses for the support of the League, to guarantee the payment of any loan issued by a signatory state threatened with aggression and authorized by a unanimous vote of the Council, which is itself subject to certain restrictions in regard to the maximum amount and duration of loans which it may authorize. A loan so authorized by the Council is valid "without any further action or consent on the part of the guarantor government." The payment of the loan will, of course, constitute a primary obligation of the borrowing government and only in case of default by it does the obligation of the guaranteeing signatories come into effect. Such is the *ordinary* guarantee assumed by all the parties to the convention. The convention, however, provides for a *special* guarantee by certain financially powerful states which may be willing to assume an obligation in addition to their ordinary guarantees. This is intended to strengthen the security of the loan by insuring full and prompt payment in case of default on the part of any of the ordinary guarantors. When in any particular case the Council authorizes a signatory state to issue a loan and fixes the amount of the annual redemption payments, each of the guaranteeing signatories will deposit with the National Bank of Switzerland bonds covering the amount for which it is responsible. The administration of the loan, including the custody of the reserve for which the convention makes provision, and the annual payments of interest and principal, is to be in the hands of a board of five trustees of Swiss nationality and domicile, elected by the Council of the League for a term of five years.

The advantages claimed for the scheme, as already indicated above, are that by placing promptly at the disposal of a state which is a victim of actual or threatened aggression, adequate financial resources at the moment when its own public credit is likely to be impaired, it will reinforce the state's power of resistance and perhaps enable it to repel the aggression without the necessity of recourse by the League to the other more difficult and heroic sanctions of the Covenant. The knowledge on the part of the intending aggressor that this aid will be forthcoming may even deter him from committing the aggression. Finally, it is claimed, that it will tend to increase the feeling of security among states, relieve them of the necessity of creating war industries in time of peace and facilitate the reduction of existing armaments.

Cases are easily conceivable in which such a system of financial aid would no doubt contribute toward the accomplishment of this object. But

there are others in which its effectiveness would be less certain. Much would manifestly depend upon the promptness with which the assistance were accorded and upon the circumstances of the particular case, such, for example, as the geographical situation of the victim. It would be difficult to devise a system of financial assistance under which the proceeds of an international loan would be automatically and immediately available to a victim of aggression. The proposed scheme if accepted will hardly have this effect. The loan must first be authorized by the Council, which must fix the amount and the annual service thereof. The Council may not be in session at the time of the aggression or the existence of the menace and may therefore have to be summoned for a special session. When the loan has been authorized the contract embodying its terms and conditions must then be approved by a person or persons designated by the Council. It must also be examined and approved by the trustees who will have to be convened for this purpose by the Secretary General of the League. These several formalities will require time and the delay may be considerable. Now the act of aggression may be sudden and the victim's ports may have been seized and the country occupied before the proceeds of the loan become available. Some of the most notable of recent acts of aggression have in fact been of this character, and in all probability most of those in the future are likely to be such. Under such circumstances a loan would be of doubtful effectiveness to the victim. Even if the proceeds were available before the act of aggression occurred, it would in many cases prove ineffective. The purpose of the loan is to enable the state authorized to issue it, to purchase the necessary war supplies to resist the aggressor. These supplies include artillery, munitions, air craft, ships and other instruments of war. They must be manufactured, built or imported from abroad. If manufactured, new war industries will have to be created, involving a delay which in the face of a powerful aggressor would be fatal. Importation from abroad of arms and munitions or the raw materials for their manufacture at home might be prevented by a blockade of the victim's own ports by the aggressor. In these circumstances what the victim needs is not money or financial credit, since they would be ineffective, but military aid or assistance in the form of collective measures of restraint against the aggressor, such as a blockade or financial boycott which would render him powerless to carry out successfully his policy of aggression. It is, of course, in large part, the desire to avoid, so far as possible, the necessity of recourse to these more difficult and more far-reaching measures of collective restraint and coercion against aggressors that has animated the authors of the present draft convention in their endeavor to elaborate a more simple scheme of assistance, one less difficult of application and one intended to enable the victim of aggression to make his own defense without involving other states in joint military or quasi-military measures against the aggressor. It would seem to the writer that the scheme possesses undoubted merits and is free from the difficulties and em-

barrassments which are inherent in a joint financial blockade or boycott, although as stated above, it would probably prove insufficient in certain cases to accomplish the object sought. In such cases recourse to the more effective sanctions of Article 16 will still be necessary. No system of financial assistance can therefore be relied upon as an effective and universal substitute for these or similar sanctions. But as a measure of "first aid" it has much to commend it. It is assumed, of course, that members of the League, whether parties to the convention or not, will refrain from assisting the aggressor by trading with him. Unless the United States, however, adopts a similar course, as is proposed by the Capper, Fish and Porter resolutions, the effectiveness of the loan might be impaired or nullified.

J. W. GARNER.

THE AMERICAN JOURNALISTS' VISIT TO THE ORIENT

In April of the current year some eleven representative members of the American press started upon a visit to the Orient under the joint auspices of the Carnegie Endowment for International Peace and certain steamship and railway companies; they visited Japan where they remained a month, Chosen some four days, Manchuria two weeks, China proper three weeks, and then returned to Japan for a two-weeks rest before starting on their homeward journey, arriving in the United States in the month of August.

The purpose of the visit was wholly educational; the members were to see with and through their own eyes the wonders of the "new" world to them, but very old to its inhabitants; to hear with their own ears and in their own language, for English is not only a language held in honor across the Pacific but in China the means of communication for the Chinese of different provinces. The pressmen were shown what they wanted to see as well as what their hosts thought might interest strangers on a first visit to strange lands; but they were left to judge for themselves and to use the varied information which they should gather in such a manner as to them might seem best, doubtless in the hope on the part of their many hosts in such a way as to promote friendly feeling between the peoples of the countries visited and the country of their birth and allegiance. This is clear from the terms of the invitation extended by Dr. Nicholas Murray Butler, President of the Carnegie Endowment:

> The Carnegie Endowment for International Peace, which is so thoroughly well satisfied with the results of its policy of establishing international contacts and of promoting international understanding by a series of international visits of representative men, is very happy now to coöperate with the Nippon Yusen Kaisha (Japan Mail Steamship Company), Japanese Government Railways, the Korean Railway, the South Manchurian Railway, the Osaka Shosen Kaisha (Osaka Merchant Steamship Company) and the Dairen Kaishen Kaisha (Dairen Steam-

> ship Company) in arranging for a visit of a party of American journalists to the Orient . . . Members of the party will be under no obligation or commitment, expressed or implied, either to the Carnegie Endowment or to any of their hosts, to accept or reflect any particular point of view. It is the sole desire of the Endowment and of the coöperating Japanese organizations that advantage be taken of the opportunity afforded by this trip for observation and study of the more significant aspects of present-day conditions in the Orient.

The representative of the Carnegie Endowment was Mr. George A. Finch, its Assistant Secretary. He was called upon to acknowledge on many occasions the courtesies extended during the trip. It would be interesting to read what he and the other members of the party said, for it is as true today as when first uttered, "out of the abundance of the heart the mouth speaketh." The remarks were doubtless informal for the most part and, born of the moment, they reached but the limited audience to which they were addressed. Fortunately, in one instance this was not the case. In Tokyo just before starting homeward Mr. Finch was called upon to speak, not merely to a select few, but to the Japanese public, and, strange as it may seem to us and doubtless to him, through the radio in Japan. Disclaiming to voice the views of the party, and confining himself to an acknowledgment of the many courtesies of which the pressmen were recipients in Japan, he spoke of things and ways Japanese. Naturally in China he and others of the visitors spoke of things Chinese, and doubtless in such a way as to voice appreciation and to leave behind the feeling with which they returned—friendliness, begotten of good will and a common understanding. Mr. Finch is Managing Editor of the AMERICAN JOURNAL OF INTERNATIONAL LAW and as such would hesitate to include his remarks, although he must know that they were appropriate to the occasion. The undersigned knows, as Honorary Editor-in-Chief, that they were not only appropriate but admirable, and indeed a model of what a foreign visitor should say in a foreign country which he is privileged to visit, and especially by a countryman of Commodore Perry and on leaving that Japan which the Commodore opened to the world at large. Therefore it is as a model of what should be felt as well as said on leaving Japan that the Honorary Editor-in-Chief inserts on his own responsibility the following text of Mr. Finch's remarks over the radio in Tokyo, July 26, 1929:

> The Carnegie Endowment is a private organization of trustees selected by the late Andrew Carnegie to administer the income of a fund which he donated to promote peace and friendship between all the nations of the world. The Endowment aims to achieve its object along many different lines of activity in all parts of the world and through instrumentalities that seem to the trustees to be the most appropriate. The trustees recognize the great influence that public opinion now exerts upon the foreign policies of governments and are desirous of aiding in the formulation of correct opinions of each other by the various peoples of the world, following the classic theory that one is seldom the enemy of another whom he knows. The outstanding agency for such an attempt

of worldwide education is undoubtedly the press. The present trip of the American pressmen to Japan is a part of that plan of work formulated by the Trustees of the Endowment.

The party remained one month in Japan, crossed to Chosen and remained four days there; then proceeded to Manchuria where it remained for two weeks; went to China proper for three weeks, and then returned to spend the last two weeks in Japan. The party has visited the principal cities of Japan; it has been privileged to pay humble but respectful homage at some of your great shrines; it has been shown some of your chief industries and business establishments; it has enjoyed the quiet beauty of a number of your rest and health resorts; it has been the recipients at the hands of the Japanese officials and people of the most bounteous, the friendliest and the most whole-hearted hospitality.

Speaking for myself, for I cannot presume to say what is in the mind of anyone else, this visit to Japan has been intensely interesting, profoundly educational, and most delightful in every way. We were fully prepared to see Japan in the course of industrial modernization, but the actual progress which we have witnessed has been surprising and altogether marvelous. The full extent of the great catastrophe which overtook parts of Japan six years ago seems not to be completely appreciated by the outside world; the courage, the organizing ability, and the energy of the Japanese people in reconstructing and restoring their homes and cities is another story most of the outside world is yet completely to learn. When I come to speak of the scenic grandeur of the many places we have visited my words utterly fail me. All Japan seems to be one continuous panorama of beauty created to bring happiness to man and peace to his soul, unmistakably and most fittingly dominated by Nature's unsurpassable temple—Mt. Fuji.

Is it any wonder, then, that the first impression, the last impression, and perhaps the most permanent impression of the foreign visitor is the cheerfulness, the contentment and the friendliness of the Japanese people. Beginning when our party boarded a Japanese ship, when it landed in Japan, and all through its long journey, we have been greeted everywhere with smiling, happy countenances, and a welcoming clasp of the hand the impulse of which we could tell came from the heart. All of these evidences of friendship and good will we shall take back with us to our country. For them we express our warmest thanks. We wish especially to thank the officials of the Imperial Government, the governors, the mayors and other city officials, the business men, the civic and other organizations, the newspapers, and the many individuals who have assisted in our welcome and entertainment and placed the means at our disposal for accomplishing the purpose of our visit.

We shall leave Japan feeling that we are parting with good friends, but with the firm hope and expectation that the friendships we have made may continue to grow and multiply. In reading the Enthronement Rescript of His Imperial Majesty the Emperor, I find these words: "It is our resolve to cultivate friendly relations with all nations, thus to contribute to the maintenance of world peace and the advancement of the welfare of humanity." I learn further that the name "Showa" was selected for the new reign because it means luminous peace. As the representative of an organization one of whose objects is "To cultivate friendly feelings between the inhabitants of different countries, and to increase the knowledge and understanding of each other by the several

nations," I cannot better conclude these remarks than by expressing my very best wishes for the success of the reign of Showa.

The undersigned has visited many a country in the day of his travels—he has been sedentary—a new rôle—for the past few months, but is writing the lines to accompany Mr. Finch's text upon the *S. S. George Washington* on the way to welcome the members of the *Institut de Droit International* upon their first visit to the New World as guests of the same Carnegie Endowment for International Peace. He has therefore had some experience in voicing appreciation of the many courtesies extended to the parting guest, and wishes that he had had Mr. Finch's remarks in his pocket and his words upon his tongue on such occasions. He is happy to be the agent of their reproduction and he expresses the hope that they may serve as a model to at least some of the readers of the JOURNAL if and when they find themselves in the interesting position of saying what his auditors would like to hear but which in the embarrassment of the moment he is likely to forget to say.

The undersigned hopes that the members of the *Institut de Droit International* may have read Mr. Finch's remarks in the October number of the JOURNAL and feel justified in expressing as friendly opinions of the United States upon the *S. S. America* at the moment of its departure for their part of the world, and in as gracious and acceptable wording. Public speaking is an art, and farewell remarks a fine art, as any one knows who has tried both and failed in one and the other.

JAMES BROWN SCOTT.

CURRENT NOTES

CARNEGIE ENDOWMENT FELLOWSHIPS IN INTERNATIONAL LAW

Fellowships in international law will be awarded by the Carnegie Endowment for International Peace, through its Division of International Law, for the academic year 1930–1931, as follows: (1) Teachers' Fellowships, carrying a stipend of $1,500 to candidates who have had at least a year's teaching experience; (2) Students' Fellowships, carrying a stipend of $1,000, to candidates who have a bachelor's degree or its equivalent in practical experience. Teachers' Fellowships may be awarded for study abroad, and in that case they will carry an additional stipend of $300 to cover the cost of the transoceanic voyage. In general, a knowledge of the elements of international law and a good knowledge of history are necessary, and it is desirable that at least two modern languages be furnished. Other special previous preparation will also be considered. An applicant who wishes to study abroad must be able to read and write the language of the foreign country in which he elects to study. Fellowships are open to both men and women of any nationality. Application blanks and other information may be obtained from the Committee on International Law Fellowships, 2 Jackson Place, Washington, D. C. March 1, 1930, is the time limit for the receipt of applications by the Committee.

PUGSLEY SCHOLARSHIPS FOR CHILDREN OF AMERICAN CONSULS

Earlham College, Richmond, Indiana, announces two Pugsley Scholarships of the value of $400 each, for the college year 1929–1930, available to a son or daughter of an American consul or vice consul of career. The scholarships are open to men and women on equal terms. The college is under the direction of the Religious Society of Friends. Admission is on examination or certificate, accompanied by character recommendations and health certificate. Sixteen units of secondary school work are required, including 3 of English, 2 of mathematics, 2 of a foreign language, 1 of a social science, and 1 of a natural science. The Earlham College catalogue and full information regarding the college will be sent upon request. In view of the fact that the college year began on September 18th, it may not be possible to make arrangements to fill these scholarships until the second semester, which begins on February 3, 1930. However, if suitable applications should be promptly received the scholarships will be awarded at once.

PROPOSED LEXICON OF POLITICAL TERMS

The International Institute of Intellectual Coöperation in its endeavors to promote coöperation between institutions for the scientific study of International relations has called attention to a proposed Lexicon on Political

Terms suggested by Dr. Wilhelm Haas, of the Deutsche Hochschule fur Politik at Berlin, to a conference of the principals of such institutions held at the Royal Institute of International Affairs in London, March, 1929. In his memorandum outlining this project, Dr. Haas emphasizes the fact that confusion and misunderstanding are constantly caused owing to the inaccurate use or imperfect understanding of political terms. The difficulties which arise in this connection are two-fold: First, terms which have a slightly different meaning in different languages so that a literal translation is necessarily misleading; and, secondly, terms which are peculiar to individual countries and therefore do not lend themselves to exact translation. It is not intended to produce a work of the scale and scope of a scientific dictionary, but simply a handbook convenient for reference, giving concise definitions which would meet the practical needs of the large and growing class engaged in handling public affairs in the international field. It is not desired to confine the lexicon to the field of public law and political science in the narrower sense, but to include economic, sociological and even geographical terms falling within the two classes above mentioned. Suggestions are invited from the readers of the JOURNAL and may be sent to the University Relations Section of the International Institute of Intellectual Coöperation, Palais Royal, 2 rue de Montpensier, Paris (1).

BRITISH-AMERICAN STUDENT CONFERENCE

Renunciation of war and the acceptance of peaceful change and arbitration, disarmament, and international coöperation were discussed in a conference of British and American students last July. The opening session was held in the Mansion House of the City of London, the Lord Mayor presiding, Viscount Cecil and Mr. Earle Babcock, of the European Center of the Carnegie Endowment for International Peace, making the principal addresses. The American and British students then went to Merton College, Oxford University. They first divided into three commissions. Each commission studied and discussed one of the subjects and then submitted resolutions to a plenary session of the conference for action by the entire group. It is noteworthy that differences of opinion which developed were not between American and British delegations but between majorities and minorities, each frequently containing members of both nationalities.

There were twenty-eight American students, equally divided between men and women, selected from International Relations Clubs of twenty-three colleges or universities in almost as many states. They were selected on the bases of scholarship and participation in school activities by the Clubs' National Secretary, Miss Amy Heminway Jones of the Carnegie Endowment, assisted by Professor Clyde Eagleton of New York University. Miss Jones, with Professors Eagleton and Howard White of Miami University, as faculty advisers, accompanied the group. Leaders of the three commissions were selected through an essay competition, Professors Parker

T. Moon, Pitman B. Potter, and Ellen D. Ellis acting as judges. The successful contestants were Susanna P. Edmondson of Randolph-Macon Women's College, John A. Reynolds of the University of California, and William B. Ballis of Leland Stanford University.

Advisers for the English delegation were Mr. J. W. Wheeler-Bennett of the Royal Institute of International Affairs and Mr. J. Arnold-Forster, secretary to Viscount Cecil. Social arrangements, including receptions for the members of the conference by His Majesty's Government at Lancaster House, by Viscountess Gladstone and by Lady Astor, were made by the Hostess of the British Universities' League of Nations Society, Dame Adelaide Livingstone, assisted by Mr. C. W. Judd, Secretary of the B. U. L. N. S., and Miss Florence Wilson of the Carnegie Endowment's European Center.

After the conference, the American group spent three weeks on the Continent, studying the work of the principal agencies of international government and visiting places of interest in Holland, Switzerland, and France. They attended a session of the Permanent Court of International Justice and were addressed by the Registrar of the Court, Mr. Hammarskjöld. A special course was arranged for them at the Geneva School of International Studies.

A similar conference will probably be convened at some American University within two years.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16, 1929–AUGUST 15, 1929

(With references to earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. I. I.*, Bulletin de L'Institut Intermédaire International. *B. I. N.*, Bulletin of international news; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *Cur. Hist.*, Current History (New York Times); *E. E. P. S.*, European Economic and Political Survey; *Europe*, L'Europe Nouvelle; *F. P. A. I. S.*, Foreign Policy Association Information Service; *G. B. Treaty Series*, Great Britain, Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations Monthly Summary; *L. N. O. J.*, League of Nations Official Journal; *L. N. Q. B.*, League of Nations Quarterly Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. press notice; *R. D. I.*, Revue de Droit International; *R. G. D. I. P.*, Revue Générale de Droit International Public; *R. D. I. P.*, Revue de Droit International Privé; *R. J. I. L. A.*, Revue Juridique International de la Locomotion Aérienne; *R. R.*, American Reviews of Reviews; *U. S. C. R.*, U. S. Commerce reports.

January, 1929

12 EGYPT—PALESTINE. Signed convention at Cairo concerning reciprocal enforcement of judgments. Text: *G. B. Treaty Series*, no. 19 (1929), *Cmd.* 3368.

February, 1929

1 GREAT BRITAIN—GREECE. Exchanged notes regarding expropriation of landed properties held by British subjects. Text: *G. B. Treaty Series*, no. 16 (1929).

26–28 RADIO STATIONS. Arrangement effected by exchange of notes between United States, Canada, Cuba, and Newfoundland, relative to assignment of high frequencies to radio stations on the North American continent. Text: *U. S. Treaty Series*, no. 777a.

March, 1929

2 CUBA—FRANCE. Exchanged ratifications of treaty of extradition signed at Havana, Jan. 3, 1925. Text: *J. O.*, June 12, 1929, p. 6434.

10 FRANCE—ITALY. Signed aerial convention at Turin. Text: *E. E. P. S.*, April 15–30, 1929, p. 518.

13 FRANCE—GREAT BRITAIN. Exchanged notes modifying agreement of Aug. 18, 1927, in regard to New Hebrides. Text: *G. B. Treaty Series*, no. 15 (1929).

17 GREECE—YUGOSLAVIA. Signed agreement, assuring free transit of Yugoslav trade through the port of Saloniki. *U. S. C. R.*, June 17, 1929, p. 737.

22 IMMIGRATION QUOTAS. President Hoover issued proclamation putting new quotas in effect on July 1. *N. Y. Times*, June 20, 1929, p. 7. Text: Proclamation no. 1872.

27 GERMANY—SALVADOR. Salvador informed German Government of its intention to abrogate commercial treaty of April 14, 1928, effective on March 27, 1930. *U. S. C. R.*, June 10, 1929, p. 679.

28 BELGIAN-LUXEMBURG ECONOMIC UNION—FRANCE. Signed an additional agreement to the commercial accord of Feb. 23, 1928. *U. S. C. R.*, June 10, 1929, p. 679.

April, 1929

5 FRANCE—SAN MARINO. Exchanged ratifications of extradition convention signed at Paris April 30, 1926. Text of convention: *J. O.*, April 10, 1929, p. 4235.

17 DENMARK—UNITED STATES. Exchanged ratifications of treaty of arbitration signed at Washington June 14, 1928. *U. S. Treaty Series*, no. 784.

22 BRAZIL—GREAT BRITAIN. Signed agreement for settling boundary between British Guiana and Brazil. Text: *G. B. Treaty Series*, no. 14 (1929).

22 CHINA—FRANCE. Exchanged ratifications of treaty regulating customs relations. Text: *J. O.*, June 5, 1929, p. 6211.

25 FRANCE—GERMANY. Exchanged ratifications of supplementary agreement to commercial treaty of Aug. 17, 1927, signed June 20, 1928. *U. S. C. R.*, July 1, 1929, p. 65. Text: *J. O.*, May 10–11, 1929, p. 5346.

25 FRANCE—GERMANY. Signed agreement in Paris to regulate details of the new frontier. *B. I. N.*, May 11, 1929, p. 17.

25 IRAQ—PERSIA. Irak Government formally recognized by Persia. *B. I. N.*, May 11, 1929, p. 23.

29 ITALY—TURKEY. Exchanged ratifications in Rome of the treaty of neutrality and conciliation signed May 30, 1928. *B. I. N.*, May 11, 1929, p. 19.

30 DOMINICAN REPUBLIC—HAITI. Exchanged ratifications of boundary treaty signed Jan. 21, 1929. Appointment of survey commissions by both countries followed, as provided for in terms of the treaty. *P. A. U.*, Aug., 1929, p. 812.

May, 1929

2 CHINA—JAPAN. First Sino-Japanese conference relating to treaty revision was held in Peking. *B. I. N.*, May 11, 1929, p. 17.

2 FRANCE—UNITED STATES. Exchanged ratifications of additional convention to that of Jan. 6, 1909, relative to extradition. Text: *J. O.*, June 5, 1929, p. 6212.

2 WALTER FLETCHER SMITH CLAIM. Award of Clarence Hale, arbitrator, submitted to Department of State in claim of Walter Fletcher Smith *v.* The Compania Urbanizadora del Parque y Playa de Marianao. Text: *Press notice*, May 16, 1929.

3 PORTUGAL—VATICAN. Exchanged ratifications at Rome of agreement respecting the concordat of 1886. Text: *E. E. P. S.*, April 15–30, 1929, p. 516.

5–10 CHINA—JAPAN. Nationalist troops took over control of Tsinan, capital of Shantung, from the Japanese who had been in possession since May 2, 1928. *B. I. N.*, May 11 and 25, 1928. On May 10, Japan's occupation of Tsinan was officially ended. *China Weekly Review*, May 25, 1929, p. 536. *U. S. Daily*, May 24, 1929, p. 3.

6 FRANCE—GREAT BRITAIN. Signed agreement respecting delimitation of boundary between Senegal and Gambia. Text: *G. B. Treaty Series*, no. 13 (1929).

6–11 LEAGUE OF NATIONS ECONOMIC CONSULTATIVE COMMITTEE. Adopted report at second session surveying the year's economic policy in fields of commerce, industry, and agriculture. *Times* (London), May 13, 1929, p. 15. *L. N. M. S.*, June 15, 1929, p. 190. (*C. 192. M. 73. 1929. II.*)

6–11 LEAGUE OF NATIONS PREPARATORY COMMISSION FOR THE CONFERENCE ON CODIFICATION OF INTERNATIONAL LAW. Held third and final session at Geneva. League Council will make arrangements for subsequent action. *L. N. M. S.*, June 15, 1929, p. 183.

7 EGYPT—GREAT BRITAIN. Exchanged notes in regard to use of the waters of River Nile for irrigation purposes. Text: *G. B. Treaty Series*, no. 17 (1929), *Cmd.* 3348.

7 GREAT BRITAIN—PERSIA. British Foreign Office announced that jurisdiction of British consular courts in Persia would be terminated on May 10, 1929. *B. I. N.*, May 11, 1929, p. 19.

8 GREAT BRITAIN—PALESTINE. Terms of agreement published regarding Dead Sea concession. *Cmd.* 3326. *B. I. N.*, May 25, 1929, p. 17.

9 BELGIUM—PERSIA. Signed permanent treaty of friendship, commerce, customs and navigation in Teheran. *B. I. N.*, May 25, 1929, p. 19.

10 CZECHOSLOVAKIA—PERSIA. Most-favored-nation commercial treaty signed on Apr. 30, 1929, came into force provisionally. *U. S. C. R.*, July 1, 1929, p. 65.

10 *to June* 28 UNIVERSAL POSTAL UNION. 9th congress held in London with representation from 80 countries. *Times* (London), May 11–June 29, 1929. *Union Postale*, May-July, 1929. *M. B. T. I.*, July, 1929, p. 40.

11–14 SCIENTIFIC STUDY OF INTERNATIONAL RELATIONS. Second conference of Institutions for the Scientific Study of International Relations met in London. *Royal Institute of International Affairs, Journal*, May, 1929, p. 185–202.

13 *to September* 10 PERMANENT COURT OF INTERNATIONAL JUSTICE. Held 16th (extraordinary) session, May 13 to July 12, to consider Franco-Serbian case, Franco-Brazilian case and case between Belgium and China. On July 12, judgments were delivered in cases concerning payment of certain Serbian loans and certain Brazilian loans issued in France. *L. N. M. S.*, June 15 and July 15, 1929, pp. 211 and 250. The 17th (ordinary) session of the court began June 17, to consider Franco-Swiss dispute concerning Free Zones of Upper Savoy and the District of Gex, and the territorial extent of the jurisdiction of the International Commission of the Oder. *L. N. M. S.*, July 15 and Aug. 15, 1929, pp. 238 and 254. On Sept. 10, the Court gave judgment by 9 votes to 3 in case between Poland, on one hand, and Great Britain, Czechoslovakia, Denmark, France, Germany and Sweden, on the other, concerning jurisdiction of International Commission of the Oder to effect that under the provisions of Treaty of Versailles the jurisdiction of the International Commission of the Oder extends to sections in Polish territory. *C. S. Monitor*, Sept. 11, 1929, p. 4. *Times* (London), Sept. 11, 1929, p. 11.

14–19 AVIATION CONGRESS. First international sanitary aviation congress held in Paris, with representatives from fourteen nations. *Droit aérien*, 1929, p. 128.

14 FRANCE—PERSIA. Signed permanent treaty of friendship in Teheran. *B. I. N.*, May 25, 1929, p. 19.

15 FRANCE—YUGOSLAVIA. Reciprocal most-favored nation commercial agreement, signed Jan. 30, 1929, came into force provisionally. *J. O.*, May 18, 1929, p. 5619. *U. S. C. R.*, July 15, 1929, p. 185.

15 ROYAL INSTITUTE OF PUBLIC HEALTH. Inaugural meeting of congress held at Zurich, under presidency of Lord Meston, with ten countries represented. *B. I. N.*, May 25, 1929, p. 23.

16 GERMANY—TURKEY. Signed arbitration treaty in Angora. *B. I. N.*, May 25, 1929, p. 19.

16 HUNGARY—LITHUANIA. Signed a commercial treaty in Budapest. *B. I. N.*, May 25, 1929, p. 17.

16 SHANGHAI COURT. Chinese Minister for Foreign Affairs sent identic notes to representatives of Great Britain, United States, France, Holland, Norway, and Brazil

on question of Provisional Court in Shanghai. Text of note: *Times* (London), May 18, 1929, p. 11.

17 ALBANIA—YUGOSLAVIA. Exchanged ratifications of extradition agreement. *B. I. N.*, May 25, 1929, p. 21.

17 ESTONIA—RUSSIA. Signed trade agreement in Reval, to remain in force for three years. *B. I. N.*, May 25, 1929, p. 15.

18 *to September* 14 BOLIVIA—PARAGUAY. Summaries of counter-memorials submitted by both countries in territorial dispute over Gran Chaco region, made public on May 18, by Inter-American Commission of Inquiry and Conciliation. *U. S. Daily,* May 20, 1929, p. 10. On July 2, Bolivia and Paraguay agreed to accept good offices of the five neutral Powers represented on the commission as a means of settling dispute. *N. Y. Times,* July 3, 1929, p. 8. On July 10, both countries reported completion of repatriation of their nationals captured during clashes at Forts Vanguardia and Boqueron. *M. B. T. I.*, July, 1929, p. 33. *P. A. U.*, Aug., 1929, p. 753–760. On Sept. 8 it was announced that both countries had made reservations regarding acceptance of Conciliation Commission's suggestion that they submit dispute to arbitration. *N. Y. Times,* Sept. 9, 1929, p. 7. On Sept. 14, Secretary Stimson announced that the two countries had resumed diplomatic relations thus paving the way for settlement of Chaco-Boreal territory dispute. Text: *U. S. Daily,* Sept. 16, 1929, p. 2. *Press notice,* Sept. 14, 1919. *N. Y. Times,* Sept. 17, 1929, p. 10.

19 HAVANA PEACE PALACE. Cornerstone of palace to house the American Institute of International Law, the American Academy of International Law, and an American International Library, was laid in Havana with appropriate ceremonies. *Revista de derecho internacional* (Havana), June, 1929, p. 209. *Evening Star,* June 2, 1929, II, 3.

20 INTERNATIONAL FEDERATION OF LEAGUE OF NATIONS SOCIETIES. 13th conference opened in Madrid. *Times* (London), May 21, 1929, p. 16.

20–22 LITTLE ENTENTE CONFERENCE. Held in Belgrade by representatives of Czechoslovakia, Rumania and Yugoslavia, at which was signed a tri-lateral arbitration treaty together with a protocol prolonging the identical treaties of alliance. *N. Y. Times,* May 21–23, 1929, pp. 8 and 11.

29 ESTONIA—FRANCE. Reciprocal most-favored-nation commercial treaty, signed on Mar. 15, 1929, came into force. *U. S. C. R.*, July 15, 1929, p. 185. *J. O.*, May 29, 1929, p. 5954.

29 GREAT BRITAIN—GUATEMALA. Exchanged ratifications of commercial treaty signed Feb. 22, 1928. *U. S. C. R.*, Aug. 5, 1929, p. 373.

30 *to June* 22 HUNGARY—RUMANIA. Conference regarding question of optants opened in Vienna on May 30 and closed on June 22 without accomplishing its task. *Times* (London), June 24, 1929, p. 13.

30 *to June* 21 INTERNATIONAL LABOR CONFERENCE. 12th session held in Geneva with representatives from 50 countries. *Times* (London), May 31–June 24, 1929. *I. L. O. M. S.*, July, 1929.

31 GERMANY—SWEDEN. Supplementary agreement to commercial treaty of May 14, 1926, came into force. *U. S. C. R.*, July 1, 1929, p. 66.

31 GUATEMALA—HONDURAS. Claims made by Honduran Government in boundary dispute over the "El Cinchado" territory, denied by Guatemala in note to Honduras made public on May 31. *C. S. Monitor,* June 1, 1929, p. 1.

31 SAFETY AT SEA CONGRESS. Delegates of 18 maritime nations signed new convention in London for guarding lives and property of those who travel on ocean highways.

N. Y. Times, June 3, 1929, p. 1. Summary: *M. B. T. I.*, June 1929. Report of American delegation made public on Aug. 19. Summary: *U. S. Daily*, Aug. 21, 1929, p. 2.

June, 1929

1 GERMANY—YUGOSLAVIA. Exchanged ratifications of supplementary agreement to commercial treaty of Oct. 6, 1927, signed Oct. 19, 1928. *U. S. C. R.*, July 8, 1929, p. 119.

1 PALESTINE—SYRIA. Reciprocal customs agreement came into force. *U. S. C. R.*, Sept. 16, 1929, p. 756.

3 CHILE—PERU. Signed Tacna-Arica treaty settling the long pending boundary dispute. Chile returned Tacna to Peru and retained port of Arica, and will grant to Peru on the Bay of Arica a wharf and a custom house and station on the Tacna-Arica railway. Chile will pay Peru $6,000,000. *N. Y. Times*, June 4, 1929, p. 3. Text of documents covering settlement: *Cur. Hist.*, July, 1929, p. 692. On July 28, ratifications of the treaty of June 3 were exchanged and the text of complementary protocol made public. Text: *N. Y. Times*, July 29, 1929, p. 9. On Aug. 28, all Chilean troops were withdrawn from Arica. *C. S. Monitor*, Aug. 29, 1929, p. 7.

4–29 AIR NAVIGATION. International Commission for Air Navigation held special session in Paris and adopted convention revising International Air Navigation convention signed at Paris on Oct. 13, 1919. *M. B. T. I.*, July, 1929, p. 13.

5 I'M ALONE CASE. Details of arbitration of case were discussed by Canadian Minister and Secretary of State. *U. S. Daily*, June 6, 1929, p. 2. Justice Willis Van Devanter, American member of commission, appointed to arbitrate case. List of other arbitrators: *U. S. Daily*, Aug. 8, 1929, p. 1.

6 POLAND—UNITED STATES. Exchanged ratifications of treaty of extradition signed Nov. 22, 1927. Text: *U. S. Treaty Series*, no. 789.

7 FRANCE—SALVADOR. Exchanged ratifications of postal arrangement of Aug. 25, 1924. Text: *J. O.*, July 26, 1929, p. 8395.

7 GERMAN REPARATIONS. On June 7, Committee of Experts for settlement of reparations problem signed report and recommendations in Paris. Text of "Young report": *N. Y. Times*, June 9, 1929, pp. 28–31. *Cur. Hist.*, July, 1929, p. 724. French text: *Europe*, June 15, 1929. On Aug. 6, the international conference called to discuss the Young report, opened at The Hague. *N. Y. Times*, Aug. 7, 1929, p. 1. On Aug. 30, an agreement on Young plan was reached, and June 30, 1930, was set as the day on which all occupying troops should be out of the Rhineland. An international banking institution is to be established. *N. Y. Times*, Aug. 30, 1929, p. 1. *Times* (London), Aug. 31, 1929, p. 10.

7 *to July* 8 VATICAN AGREEMENT. On June 7 Premier Mussolini and Cardinal Gasparri, Papal Secretary of State, exchanged ratifications of treaties signed at Lateran Palace on Feb. 11, 1929. *N. Y. Times*, June 8, 1929, p. 1. *Times* (London), June 8, 1929, p. 14. *Cur. Hist.*, July, 1929, p. 704. Texts: *E. E. P. S.*, Apr. 15–30, 1929. On June 10 the "fundamental law," or constitution, of State of Vatican City, came into force. *N. Y. Times*, June 11, 1929, p. 10. *Cur. Hist.*, Aug., 1929, p. 940. Diplomatic relations between Italy and Holy See were fully established on July 8 with visit of Mgr. Borgongini Duca, first papal nuncio to modern Italy, to King Victor Emmanuel at the Quirinal Palace. *N. Y. Times*, July 9, 1929, p. 5.

8 NETHERLANDS—VENEZUELA. Band of exiled revolutionaries at Curaçao, Dutch West Indies, raided police headquarters at Willemstad and seized arms and ammunition; commandeered the U. S. A. steamer *Maracaibo*, crossed to Venezuelan coast, taking the governor and chief of police as hostages, subsequently sending

them back to Willemstad. On June 11, martial law was proclaimed at Willemstad. On June 12, Venezuelan *chargé d'affaires* conveyed to Dutch Government expression of regret regarding incident. *B. I. N.*, June 22, 1929, p. 21.

9 FRANCE—TURKEY. Commercial travelers' convention, signed Nov. 1, 1927, promulgated in France after exchange of ratifications. Text: *J. O.*, July 9, 1929, p. 7667.

10 CZECHOSLOVAKIA—GREECE. Signed pact of friendship, conciliation and arbitration including two articles from Pact of Paris for renunciation of war. *B. I. N.*, June 22, 1929, p. 13.

10 HUNGARY—SPAIN. Signed treaty of friendship, mediation and arbitration in Madrid. *B. I. N.*, June 22, 1929, p. 18.

10–15 LEAGUE OF NATIONS COUNCIL. Held 55th session at Madrid for consideration of protection of minorities; creation of fiscal committee; arrangements for four international conferences on (1) Bills of exchange and checks, (2) Customs, railway and postal questions, (3) League conference on codification of international law, (4) Amendments to statute of Permanent Court of International Justice. Proposal of Committee of Jurists on accession of United States to the court was adopted and placed on agenda of next Assembly. Final report of preparatory committee for the first conference on the codification of international law was considered by the Council, which fixed provisional date of March 13, 1930, as the opening date of meeting at The Hague. *L. N. M. S.*, July 15, 1929. *L. N. O. J.*, July, 1929.

11 GERMANY—SOUTH AFRICA. Exchanged ratifications of most-favored-nation commercial treaty signed Sept. 1, 1928. *B. I. N.*, June 22, 1929, p. 15.

11 GREECE—RUSSIA. Signed most-favored-nation commercial treaty granting certain tariff concessions. *U. S. Daily*, June 15, 1929, p. 2. *Times* (London), June 13, 1929, p. 15.

14 PRUSSIA—VATICAN. Signed concordat in Berlin. Summary: *Times* (London), June 15, 1929, p. 13.

15–30 LIBRARY CONGRESS. First World Library and Bibliographical Congress opened in Rome on June 15, with address by Benito Mussolini, and closed in Venice on June 30. About 1400 delegates were present from 32 countries. Resolutions: *Royal Inst. of Int. Affairs, Journal*, July, 1929, p. 407. *Library Journal*, Sept. 1, 1929, p. 699–704.

21 GREAT BRITAIN—INDIA. Exchanged notes respecting consular fees on certificates of origin. Text: *G. B. Treaty Series*, no. 20 (1929), *Cmd.* 3369.

21 WOMEN'S ALLIANCE FOR SUFFRAGE AND EQUAL CITIZENSHIP. 1000 women representing 42 countries held in Berlin eleventh congress of International Alliance of Women for Suffrage and Equal Citizenship. *C. S. Monitor*, June 17, 1929, p. 1. *N. Y. Times*, June 23, 1929, II, 1.

22 *and* 29 FRANCE—TURKEY. Signed agreement on June 22 for delimitation of frontier between Syria and Turkey, and a protocol on June 29 relative to surveillance and fiscal régime of the frontier. Texts: *Europe*, Aug. 24, 1929, p. 1143. *Times* (London), June 24 and July 27, 1929.

22 UNITED STATES—YUGOSLAVIA. Exchanged ratifications of treaties of conciliation and arbitration signed Jan. 21, 1929. Text: *U. S. Treaty Series*, nos. 790–791.

26 AUSTRIA—ESTONIA. Exchanged ratifications of most-favored-nation commercial treaty signed Dec. 11, 1928. *U. S. C. R.*, Aug. 26, 1929, p. 572.

27 BOLIVIA—BRAZIL. Exchanged ratifications of treaty on boundaries and railway communications. *C. S. Monitor*, June 28, 1929, p. 1. *P. A. U.*, Sept., 1929, p. 921.

29 EGYPT—PORTUGAL. Protocol of May 24, 1885, conceding most-favored-nation treatment to Portugal denounced by Egypt, effective Feb. 16, 1930. *U. S. C. R.*, Aug. 26, 1929, p. 572.

July, 1929

1 NATIONALITY OF MARRIED WOMEN. Law approved, amending Art. 22 of the Cuban Civil Code, to the effect that a Cuban woman who marries a foreigner shall not lose her nationality by this act. *P. A. U.*, Sept., 1929, p. 923.

1–27 RED CROSS. International diplomatic conference to revise Geneva Red Cross Convention of 1906 opened at Geneva on July 1, and closed on July 27, with signature by 32 of the 47 nations of new code on prisoners of war and a convention on treatment of sick and wounded in time of war. *N. Y. Times*, July 28, 1929, p. 3. Text of conventions: *Times* (London), July 27, 1929, p. 11. *M. B. T. I.*, July, 1929. *Revue Int. de la Croix-Rouge*, July–Aug., 1929.

2 FINLAND—TURKEY. Treaty of commerce and navigation signed June 2, 1926, expired. *U. S. C. R.*, Sept. 16, 1929, p. 756.

2 GREAT BRITAIN—TURKEY. Temporary most-favored-nation agreement arranged by exchange of notes. Text: *G. B. Treaty Series*, no. 18 (1929), *Cmd.* 3366.

8 LIGHTHOUSE CONGRESS. First International lighthouse conference opened in London. *Times* (London), July 9, 1929, p. 11.

10 *to August* 30 CHINA—RUSSIA. On July 10, Chinese and Manchurian officials seized control of telephone and telegraph systems of Chinese Eastern Railway and the Soviet mercantile fleet and closed offices of certain Soviet trade unions. Reasons for this raid and those upon the Soviet consulates at Harbin and elsewhere on May 27, were summed up in statement of Dr. Wang at Peking on July 12, as a means of stamping out all forms of communist propaganda in China. On July 14, Russian Foreign Office addressed ultimatum to Nanking, to which Chinese Foreign Office replied on July 16. Second Soviet note presented on July 17, breaking off diplomatic relations. Texts: *B. I. N.*, July 18, 1929. *Times* (London), July 14, 15, 17, 18, 1929. On July 19, Secretary Stimson, through diplomatic channels, reminded Chinese and Soviet Governments of their obligations under General Pact for Renunciation of War, and on July 25, he handed *aide-memoire* in projected negotiations between China and Russia to representatives of Great Britain, France, Japan, Italy, and Germany. *N. Y. Times*, July 20 and 26, 1929, pp. 1 and 3. On Aug. 1, exchange of notes took place between China and Russia. Texts: *Soviet Union Review*, Sept., 1929, p. 133. Possible new basis of mediation suggested in note which Dr. Wu, Chinese Minister to United States, delivered to Secretary Stimson. Text: *Press notice*, Aug. 21, 1929. *N. Y. Times*, Aug. 23, 1929, p. 6. On Aug. 30, Soviet Government accepted proposals of China for conclusion of joint declaration for settlement of all questions arising out of dispute over Chinese Eastern Railway. *C. S. Monitor*, Aug. 31, 1929, p. 1.

10 FRANCE—SPAIN. Signed treaty of arbitration and amity in Paris. *B. I. N.*, July 18, 1929.

13 BELGIUM—GERMANY. Agreement on reimbursement of Belgium for German marks left behind in the country in exchange for Belgian francs confiscated during the war was signed in Brussels. *N. Y. Times*, July 14, 1929, p. 6. Text: *Europe*, Aug. 3, 1929, p. 1074.

13 BELGIUM—GERMANY. Signed agreement in Berlin providing for suspension as from June 27, 1929, of sales of sequestered German property in Belgium and restoration of property not yet sold. *B. I. N.*, July 18, 1929.

13 FRANCE—SPAIN. Signed convention for administration of certain international railway stations. Text: *J. O.*, Aug. 1, 1929, p. 8732.

15 CODIFICATION CONFERENCE. Secretary General of League of Nations informed Department of State that date of Conference for Codification of International Law has been provisionally fixed for Mar. 13, 1930. List of states invited and subjects on agenda. *M. B. T. I.*, Aug., 1929, p. 5. *U. S. Daily*, Sept. 20, 1929, p. 3.

15 PERU—UNITED STATES. Reciprocal agreement came into force for waiver of fees for non-immigrant visas. *M. B. T. I.*, July, 1929, p. 44.

18 EMBARGO ON ARMS. President Hoover issued proclamation raising ban on embargo of arms to Mexico. Text: *N. Y. Times*, July 20, 1929, p. 4. *U. S. Daily*, July 20, 1929, p. 1. Text: *Press notice*, July 19, 1929.

20 GERMANY—SWITZERLAND. Supplementary agreement to most-favored-nation commercial treaty of July 14, 1926, signed April 23, 1929, came into force. *U. S. C. R.*, Aug. 12, 1929.

21–26 FRANCE—UNITED STATES. Mellon-Berenger agreement for settlement of French war debt to the United States, dated April 29, 1926, approved by French Chamber of Deputies, by vote of 300 votes to 292 on July 21, and by French Senate by vote of 242 to 30 on July 25, 1929. Ratified by presidential decree. Text: *J. O.*, July 27, 1929, p. 8458. President Hoover's statement. *U. S. Daily*, July 29, 1929, p. 1.

22 BULGARIA—HUNGARY. Signed treaty of conciliation and arbitration in Budapest. *B. I. N.*, Aug. 1, 1929.

22 BULGARIA—UNITED STATES. Exchanged ratifications of treaties of arbitration and conciliation signed Jan. 21, 1929, both of which came into force on July 22. *Press notice*, July 27, 1929. *U. S. Treaty Series*, nos. 792–793.

22 RUMANIA—UNITED STATES. Exchanged ratifications of treaties of arbitration and conciliation signed Mar. 21, 1929, both of which came into force on July 24. *Press notice*, July 27, 1929. *U. S. Treaty Series*, nos. 794–795.

24 HUNGARY—UNITED STATES. Exchanged ratifications of treaties of arbitration and conciliation signed Jan. 26, 1929, both of which came into force on July 22. *U. S. Treaty Series*, nos. 797–798.

25 FRANCE—GERMANY. Exchange of letters of June 10, 1929, on the extension to Indo-China of commercial agreement of Aug. 17, 1927, promulgated by France. Text: *J. O.*, July 27, 1929, p. 8459.

26 FRANCE—GREAT BRITAIN. Presidential decree issued in France ratifying agreement of July 12, 1926, for settlement of French debt to Great Britain. Text: *J. O.*, July 27, 1929, p. 8458.

29 ESTONIA—GERMANY. Most-favored-nation commercial treaty signed Dec. 7, 1928, came into force after exchange of ratifications. *U. S. C. R.*, Sept. 2, 1929, p. 638.

29 FRANCE—UNITED STATES. Signed convention for exchange of money orders between the offices of the mandate territory of Syria and the Lebanon and the United States. Text: *J. O.*, Aug. 10, 1929, p. 9316.

August, 1929

3 ABYSSINIA—ITALY. Exchanged ratifications of treaty of friendship and conciliation of Aug. 2, 1928. *B. I. N.*, Aug. 15, 1929.

3 HEJAZ—TURKEY. Signed treaty of friendship at Mecca. *B. I. N.*, Aug. 15, 1929.

5 ETHIOPIA—UNITED STATES. Exchanged ratifications of treaties of conciliation and arbitration signed Jan. 26, 1929. Texts: *U. S. Treaty Series*, nos. 799–800.

6 EGYPT—GREAT BRITAIN. Exchanged notes containing proposals for abandonment of British military occupation of Egypt and other reforms. Text: *Times* (London), Aug. 7, 1929, p. 9. *B. I. N.*, Aug. 15, 1929. *Cur. Hist.*, Sept., 1929, p. 1170. *Cmd.* 3376.

10 *to September* 5 EXTRATERRITORIALITY. In note to China, the United States declined to accede to request of Nanking Government of April 27 for immediate abolishment of extraterritoriality. Text: *U. S. Daily*, Aug. 10, 1929, p. 1. *Press notice*, Sept. 12, 1929. Similar notes were sent to China by Great Britain, Netherlands, France, Brazil, and Norway. *Times* (London), Aug. 15, 1929, p. 10. On Sept. 5, Nanking Government requested United States to enter into immediate negotiations for abolition of extraterritorial rights in China. Text: *U. S. Daily*, Sept. 13, 1929, p. 1. *Press notice*, Sept. 12, 1929.

15 HEJAZ—PERSIA. Signed commercial treaty. *B. I. N.*, Aug. 29, 1929.

INTERNATIONAL CONVENTIONS

AGRICULTURAL WORKERS ASSOCIATION. Geneva, Nov. 12, 1921.
Ratification: France. Mar. 15, 1929. *I. L. O. B.*, May 15, 1929, p. 32.

ALIENS STATUS. Havana, Feb. 20, 1928.
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WORKMEN'S COMPENSATION FOR ACCIDENTS. Geneva, June 10, 1925.
Ratifications:
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Ratifications:
Portugal. Mar. 28, 1929.
Spain. Feb. 3, 1929. *I. L. O. B.*, May 15, 1929.
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Ratification: Portugal. *I. L. O. B.*, May 15, 1929.

M. ALICE MATTHEWS.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

HUNGARIAN-CZECHOSLOVAK MIXED ARBITRAL TRIBUNAL

ALEXANDRE PALLAVICINI *v.* THE CZECHOSLOVAK STATE
(No. 70)

Judgment rendered at The Hague January 31, 1929

[Translation]

Jurisdiction assumed by the tribunal, under Article 250 of the Treaty of Trianon, of application of a Hungarian national for the restitution of or compensation for real estate owned by him and situated in Czechoslovakia which had been subjected to measures depriving the owner of the free power of disposition and eventually tending to transfer the property to third parties without the owner's consent, which measures Czechoslovakia claimed were enacted in the exercise of its sovereignty for the purpose of revision of the distribution of landed property in carrying out a policy of agrarian reform.

Plea by Czechoslovakia to the jurisdiction of the tribunal overruled, and new pleadings ordered on the merits.

The Hungarian-Czechoslovak Mixed Arbitral Tribunal, in session at The Hague and composed of MM. Schreiber, President; Szladits, Hungarian Arbitrator; Hora, Czechoslovak Arbitrator; assisted by M. Struycken, neutral secretary agreed upon by the Hungarian and Czechoslovak Governments,

Having regard to the claim brought by the Marquis Alexandre Pallavicini against the Czechoslovak State, registered at the secretariat on December 27, 1923;

Having regard to the plea taking exception to the jurisdiction entered by the Agent of the Czechoslovak Government on November 25, 1926;

Having regard to the counterplea, replication and rejoinder appertaining thereto, filed by the parties on April 19, 1927, January 7 and May 8, 1928;

Having heard at the sittings at The Hague on January 15, 16, 17 and 18, 1929, MM. E. Loewenfeld, barrister of Berlin, F. Wien-Claudi, barrister of Prague, and Professors Gidel, Brunet and Barthélemy, barristers to the Court of Appeal of Paris, on behalf of the applicants,

And Professors Jèze and Diena, representatives of the Czechoslovak State, and MM. Hobza and de Gajzágó, Agents of the Czechoslovak and Hungarian Governments, in their pleadings and submissions,

Having regard to the records and documents presented at the proceedings,

Deciding on the case,

Has delivered the following judgment:

THE FACTS

The applicant, residing either at Sövényháza, Hungary, or at 5, Josefplatz, Vienna, is the owner of the estate of Daschitz situated in Czecho-

slovakia. He is a Hungarian national in the restricted sense as defined in Article 246 of the Treaty of Trianon, in accordance with the certificate of nationality attached to the documents.

It is set forth in the application that the property rights of the applicant, in the estate of Daschitz, have been subjected to measures applied by the Czechoslovak authorities in pursuance of laws and orders enacted in Czechoslovakia on November 9, 1918, April 16, 1919, July 11, 1919, March 11, 1919, June 11, 1919, and June 23, 1919.

He was, in the first place, forbidden to sell or mortgage his estate without permission from the Czechoslovak authorities, and subsequently the estate was placed under an embargo. The said measures have been entered in the land register.

The applicant considers that the application that has been made of the aforementioned Czechoslovak laws to his property situated in the territories of the former Austro-Hungarian Monarchy is contrary to the provisions of paragraphs 1 and 2 of Article 250 of the Treaty of Trianon, and, under the third paragraph of that same article, he requests the Hungarian-Czechoslovak Mixed Arbitral Tribunal

(1) To order the Czechoslovak State to restore to him with costs the estate of Daschitz and all appertaining thereto according to preliminary particulars, freed from all measures of sequestration, retention or liquidation or any other measure of transfer and in the condition in which such property was on November 3, 1918, the date of the armistice, and to cause all entries in the land register relating to these measures to be expunged.

(2) To give judgment to the effect that, where restitution *in natura* cannot, for whatsoever reason, be made in the condition in which such property was on April 24, 1919, the Czechoslovak State shall be bound to pay to the applicant the full value of this property, that is to say, the ordinary value, and full compensation for all deterioration that shall have taken place since that date. In the event of the impossibility of restitution in specie being already established in the course of the trial, the Tribunal is requested to fix the value of this property and to order the Czechoslovak State to pay the sum total to the applicant.

(3) The Tribunal is finally requested to give judgment to the effect that, in the event of its being impossible to restore the property in specie, or in the event of such property having suffered deterioration, the applicant shall be authorized to bring before the Hungarian-Czechoslovak Mixed Arbitral Tribunal an action for full compensation, within six months from the day of the refusal of compensation.

This application having been brought to the notice of the Agent of the Czechoslovak State, that gentleman put forward a double plea of objection:

(1) A plea that the Tribunal would take no cognizance of the claim. The Czechoslovak laws and orders cited by the applicant, in pursuance of which the measures complained of were applied, were all enacted in Czecho-

slovakia, in the exercise of that state's full sovereignty, for the purpose of revision of the distribution of landed property, or, as shall be hereafter said, for the purposes of agrarian reform without any importance attaching to the employment of that expression; Czechoslovakia, in carrying out such reform is keeping within her sovereign rights and, therefore, all recourse to international jurisdiction, whether by a state or by an individual foreigner, is excluded.

(3) An objection in point of law based substantially on the ground that the measures to which exception has been taken are not such as are covered by the two first paragraphs of Article 250, nor such as are dealt with in Article 232 and the annex to that article, for the reason that, in the opinion of the Agent of the Czechoslovak State, they lack certain essential characteristics, such as that called differentiation and the direct connection with the war which was ended by the Treaty of Trianon; the two first paragraphs of Article 250 not being applicable, the Hungarian-Czechoslovak Mixed Arbitral Tribunal would not have jurisdiction in the terms of the third paragraph to hear the case.

According to the rules of procedure adopted by the Hungarian-Czechoslovak Mixed Arbitral Tribunal in conformity with paragraph 2 of the annex to Article 239 of the Treaty of Trianon, the respondent may enter a plea to the jurisdiction, either by means of a plea taking exception before going into the merits, or by a defence on the merits. The choice of the respondent is binding on the Tribunal as soon as it has been accepted by the applicant, whether implicitly or explicitly, as is the case here. It is in these circumstances that the enquiry into the merits must be and has been suspended.

In Law

The two objections raised by the Agent of the Czechoslovak State are found, on examination, to be merged into a single one. In fact, as soon as it is established that a clause of the Treaty of Trianon confers jurisdiction on the Mixed Arbitral Tribunal to take cognizance of the case submitted to it, it must at the same time be admitted that the applicant is authorized by that same clause to have recourse to the jurisdiction of the said Tribunal. It is therefore the objection to the jurisdiction that will especially engage the attention of the Tribunal.

On embarking upon this enquiry it is necessary to give full effect to this principle, that, the plea to the jurisdiction having been entered *in limine litis*, the Tribunal, in deciding upon its competence, must not enter into any consideration of the merits. If it declares itself to have jurisdiction, it must do nothing to prejudice the position of either of the parties on the merits; if it declares itself to have no jurisdiction, it will be because it will have recognized that it is not qualified to take cognizance of the case and that, therefore, it would, in pronouncing on the merits, be exceeding its powers.

The applicant bases his claim on Article 250 of the Treaty of Trianon. It is set forth in that article as follows:

> Notwithstanding the provisions of Article 232 and the annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.
>
> Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present treaty, in the condition in which they were before the application of the measures in question.
>
> Claims made by Hungarian nationals under this article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239.

The two subsequent paragraphs have no bearing on the case.

The applicant is a Hungarian national as has been set forth in the statement of facts. The property, the subject of the application, is situated in the territories of the former Austro-Hungarian Monarchy. These points have not been contested, neither has the applicant's right of ownership. It is alleged in the application that the said property has been subjected by the Czechoslovak authorities to measures resulting in the removal from property-owners of the power of free disposition over such property and tending to affect in the end the ownership itself by transferring such property in whole or in part to third parties without the consent of the owner, all of which is within paragraph 3 of the annex to Article 232 of the Treaty of Trianon. The fact that these alleged measures were taken is not contested and it is further not contested that these measures, initiated during the period of the armistice, that is to say, shortly after November 3, 1918, were pursued after the coming into force of the Treaty of Trianon; those which may have been applied after July 26, 1921, are only the consequence, the logical termination of those which were taken prior to that date.

It follows from these facts, which may be considered as sufficiently established, that the particular case submitted for the consideration of the Mixed Arbitral Tribunal is certainly included in the class of disputes which, according to the terms of the third paragraph of Article 250, may be submitted to it and of which it must take cognizance.

The applicant finally asserts that the measures of which he complains are incompatible with the undertakings of the Czechoslovak State with regard to Hungary, which undertakings are specified in the two first paragraphs of Article 250. It is this last assertion that is contested *in limine litis* by the respondent.

Now, this is the fundamental issue of the case, and, if the Tribunal were to decide it at this stage of the proceedings, it would be giving a final judgment on the merits of the case. *In limine litis* it is sufficient for the Tribunal

to ascertain that the provisions of the treaty to which reference must be made in order to adjudicate upon this claim are really to be found in Article 250, the third paragraph of which establishes its jurisdiction. Now, on this point, there can, even now, be no manner of doubt. It is therefore from the merits of the case that the respondent draws the arguments alleged in favor of his objection.

Now, to permit a party to give the character of a peremptory plea to a plea of exception to the jurisdiction which cannot be adjudicated upon without going into the merits, when it is merely presented *in limine litis*, is inadmissible, as has been laid down by the Permanent Court of International Justice at The Hague in Judgment No. 6, page 15.

It is a question which concerns the actual substance of the case, whether the measures that the Czechoslovak State has seen fit to take with regard to the property of the applicant by reason of an agrarian reform are or are not compatible and to what degree they might be compatible with the undertakings stipulated for in favor of Hungary in the two first paragraphs of Article 250. Has the Mixed Arbitral Tribunal jurisdiction to decide this question? It must be answered in the affirmative as soon as it is found that the provisions that permit such decision are those of the first two paragraphs of Article 250 and Section IV, "Property, rights and interests," of Part X of the Treaty of Trianon. Moreover, if any doubt could exist in the matter, it would be removed on examination of the preliminaries.

The third paragraph of Article 250 of the Treaty of Trianon was inserted at the request of the Hungarian delegation. In Note No. XXXVII, dated February 19, 1920 and addressed to the President of the Peace Conference, Annex 6, the text of which will be found in the report of the work of the Hungarian Peace Delegation at Neuilly, Vol. II, p. 460, the Hungarian delegation expressly referred to the Czechoslovak legislation concerning the requisition of large landed properties, when requesting a reassuring declaration to achieve the purpose of the first paragraph of Article 250. The delegation requested at the same time that, in the event of "a discussion arising on the question of the obligation to restore property," it should be permissible to apply to the Mixed Arbitral Tribunal, "which should be authorized to fix compensation in favor of the injured party in the event of the interested Power not carrying out its obligation to restore property."

In the reply of the Allied and Associated Powers to the observations made by the Hungarian delegation with regard to the conditions of peace, a reply addressed to the aforesaid delegation on May 16, 1920, it is stated, with reference to Article 250:

> The various observations put forward by the Hungarian Delegation with reference to the treatment meted out by Roumania and Czechoslovakia to immovable property constitute a question of interpretation of the Peace Treaty, which cannot be dealt with here and now.
>
> The Allied Powers have on the other hand no objection to recourse

> to the Mixed Tribunal, as proposed by the Hungarian Delegation, for the settlement of disputes regarding the restitution to nationals of the former Kingdom of Hungary of their property, rights and interests situated in transferred territory, as provided in Article 250 of the treaty.
>
> Consequently, they agree to complete that article with the following words: Claims that may be made by Hungarian nationals under the present article shall be submitted to the Mixed Arbitral Tribunal provided for in Article 239.

These texts are perfectly clear and leave room for no ambiguity: It is for the Mixed Arbitral Tribunal to judge claims which may be made by Hungarian nationals under Article 250, *including those brought by reason of the application of the Czechoslovak agrarian reform.*

It might almost be said that it was these latter in particular which caused the insertion of the third paragraph into the text of Article 250.

It is true that the respondent produced, in the course of the proceedings, copies of two letters one addressed on August 8, 1919, by M. Beneš to M. Dutasta, Secretary-General to the Peace Conference, and the other, which was the reply, addressed on August 13, 1919, to M. Beneš by the president of the Commission on New States and the Protection of Minorities. These documents call for two observations. They are anterior by several months to the abovementioned notes. Further, they do not appear to have any direct connection with the question at present before the Mixed Arbitral Tribunal. In any case, they do not affect in any way whatever the question of jurisdiction and it is only in the examination on the merits, should the case arise, that the juridical principles they embody could be taken into consideration.

Article 239 and the third paragraph of Article 250 of the Treaty of Trianon constitute an arbitration clause of considerable scope, but making no reservation with regard to the sovereignty or the vital interests of the contracting parties. Neither is such a reservation to be assumed. The jurisdiction of the Mixed Arbitral Tribunal is therefore in no wise limited by such considerations. This Tribunal is absolutely at liberty, in giving judgments on the merits to weigh the extent of the undertakings entered into by the Czechoslovak State with regard to Hungary in the first two paragraphs of Article 250, undertakings backed by all the Allied and Associated Powers which signed and ratified the treaty.

Following on the proceedings on the merits, the Tribunal may in a like manner advantageously go into the question of whether Hungarian nationals may claim preferential treatment over Czechoslovak nationals, or whether equality of treatment constitutes the limits of their rights. In any case, differentiation cannot be a condition of jurisdiction for the Mixed Arbitral Tribunal; it is a point in the merits of the case.

The respondent has taken it to be a condition of the Mixed Arbitral Tribunal's jurisdiction that the measures objected to should have a *close connection* with the war brought to a conclusion with the Treaty of Trianon. Such a condition is not expressed, either in the first two paragraphs of Article

250, or in Article 232 or its annex. The second paragraph of Article 250 mentions a great many measures applied during the period of the armistice and Article 232 no doubt deals with "exceptional war measures," which implies a certain relation between the measures objected to and the war. Is not a connection in point of time sufficient, however, to establish the jurisdiction of the Mixed Arbitral Tribunal? The Mixed Arbitral Tribunal has held, in the present case, a connection between the alleged measures and the war, when the question of the jurisdiction of the Mixed Arbitral Tribunal arose in connection with the Czechoslovak agrarian reform, in the course of the peace negotiations. It can only be in the examination of the merits that the effect on the solution of the case of a closer connection between the war and the incriminated measures could be considered.

Finally, the respondent state availed itself of the submissions in the report presented by Sir Austen Chamberlain to the Council of the League of Nations in September, 1927, on the occasion of a dispute that arose between Hungary and Roumania in a case showing very considerable analogy with that at present before the Hungarian-Czechoslovak Mixed Arbitral Tribunal. The respondent state would seem ready to admit the jurisdiction of this Tribunal on the conditions indicated in the three points forming the conclusion of that report, but not otherwise. The respondent state admits, however, and rightly, that the Hungarian-Czechoslovak Mixed Arbitral Tribunal cannot be bound by these conclusions. However much interest attaches to the juridical considerations expounded in Sir Austen Chamberlain's report, the Mixed Arbitral Tribunal is obliged to declare that the Council of the League of Nations, an authority of eminently political character, could not claim to have found a judicial solution of the Roumanian-Hungarian dispute. It was seized of this dispute by Roumania under Article 11 of the Covenant of the League of Nations, and, on the basis of that Article 11, it fulfilled its political *rôle* of mediator and conciliator. It was on account of that *rôle* that jurists who had not been named could be consulted and that Sir Austen Chamberlain made his report. It was a conciliation proposal made to both parties, on the basis of which, moreover, those latter were not able to come to an understanding.

The Hungarian-Czechoslovak Mixed Arbitral Tribunal, which today fills quite another *rôle* and is to give judgment, states further that the submissions of Sir Austen Chamberlain's report already concern the merits of the case, and even substantially concern the merits of the case. It is only after declaring itself to have jurisdiction and after the proceedings on the merits that the Tribunal may, if the case arises, consider whether there is occasion and how far there is occasion to be influenced by the report.

For the foregoing reasons and reserving for the proceedings on the merits a more detailed examination of the arguments already brought forward by the two parties, in so far as they may be upheld, the Hungarian-Czechoslovak Mixed Arbitral Tribunal

Declares itself to have jurisdiction,

Admits the case and orders a fresh exchange of documents on the merits,

Reserves costs.

The present judgment was adopted by a majority of two votes to one at The Hague, on January 31, 1929.

A dissenting opinion has been given by Professor Hora, the Czechoslovak Arbitrator, and is attached to the judgment.[1]

(Signed) SCHREIBER, *President.*
(Signed) SZLADITS.
(Signed) A. J. N. M. STRUYCKEN, *Secretary.*

HIGH COURT OF JUSTICE, KING'S BENCH DIVISION

DICKINSON *v.* DEL SOLAR (MOBILE AND GENERAL INSURANCE COMPANY, LIMITED, THIRD PARTIES)[2]

July 31, 1929

Diplomatic privilege does not impart immunity from legal liability for wrongful acts but only exemption from local jurisdiction, which may be waived. Its waiver is not a breach of the conditions of a policy insuring against liability for automobile accidents, and the judgment against the diplomat creates a legal liability against which the insurance company agreed to indemnify him.

(Before the Lord Chief Justice.)

His Lordship delivered judgment on the liability of the third parties, Mobile and General Insurance Company, Limited, to indemnify the defendant in this case.

A verdict for £956 damages was returned in favor of Mr. Robert Edmund Dickinson, of 13, St. James's Square, S. W., a director of the Westminster Bank, Limited, of the Standard Bank of South Africa, and of the National Provident Institution, in the action in which he claimed from Mr. Emilio Del Solar, First Secretary of the Peruvian Legation in London, damages for personal injuries which he received through being knocked down in the East Carriage-road, Hyde Park, by a motor-car driven by Mr. Del Solar's chauffeur. Judgment was entered accordingly, with costs.

Mr. Del Solar was insured against third party claims with the Mobile and General Insurance Company, Limited, and a third party notice had been served on them claiming that they were liable to indemnify Mr. Del Solar in respect of Mr. Dickinson's claim and his own costs of defending the action.

The company repudiated liability on the ground that the insurance was against "legal liability" to members of the public, and that Mr. Del Solar was under no legal liability to Mr. Dickinson in that he was entitled to diplomatic immunity. They relied on conditions in the policy that "the assured . . . shall not in any way act to the detriment or prejudice of the

[1] Omitted from this JOURNAL.

[2] The Times, London, August 1, 1929.

company's interests" and "the company is entitled to take absolute control of all negotiations and proceedings." They contended that Mr. Del Solar had broken those conditions by insisting on the instructions of his Minister that the plea of diplomatic immunity should not be raised, and that they were thereby relieved from liability.

Mr. Bensley Wells and Mr. S. J. R. Bucknill appeared for Mr. Del Solar; Mr. Tristram Beresford for the insurance company.

Judgment

His Lordship, in giving judgment, said: In my opinion, diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is, I think, that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not impart immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the sovereign or of the official superior of the agent. Taylor *v.* Best (14 C. B., 487); Suarez *v.* Suarez (34 *The Times*, 127; [1918] 1 Ch., 176).

In the present case the privilege was waived and jurisdiction was submitted to by the entry of appearance (see Suarez *v.* Suarez ([1918] 1 Ch., at p. 193); Duff Development Company *v.* Kelantan Government (40 *The Times*, L. R., 566; [1924] A. C., 797, at p. 830), and, as Mr. Del Solar had so submitted to the jurisdiction, it was no longer open to him to set up privilege. If privilege had been pleaded as a defence, the defence could, in the circumstances, have been struck out. Mr. Del Solar, I think, was bound to obey the direction of his Minister in the matter.

In these circumstances it does not appear to me that there has been, on the part of Mr. Del Solar any breach of the conditions of the policy, and the judgment clearly creates a legal liability against which the insurance company have agreed to indemnify him. It has been argued that, by reason of the privilege, execution cannot issue against Mr. Del Solar on the judgment. That is perhaps an open question (see Duff Development Company *v.* Kelantan Government ([1924], A. C., at p. 830). But, in my opinion, it is not necessary to decide it. Even if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceases to be a privileged person, and the judgment might also be the foundation of proceedings against him in Peru at any time.

I hold, therefore, that the third parties here are liable.

A stay of execution was granted.

Solicitors.—Messrs. Digby and Co.; Messrs. S. Myers and Son.

GENERAL CLAIMS COMMISSION—UNITED STATES AND MEXICO [1]

KATE A. HOFF *v.* THE UNITED MEXICAN STATES

(Docket No. 331)

Opinion rendered April 2, 1929

While recognizing the general principle of immunity from local laws of foreign vessels in distress, it has been said that the necessity prompting vessels to seek refuge must be urgent. A ship foundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that the vessel may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea of distress is unjustifiable.

An important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. Even in the absence of any such attempt, it cannot be said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation cannot justify a disregard of local laws.

The *Rebecca* entered the port of Tampico in distress and the seizure by the Mexican customs authorities of both the vessel and cargo was wrongful.

Counsel: United States, Stanley H. Udy; Mexico, Enrique Munguía, Jr.

COMMISSIONER NIELSEN, *for the Commission.*

Claim in the amount of $10,000.00 with interest is made in this case by the United States of America in behalf of Kate Allison Hoff, administratix of the estate of Samuel B. Allison. The latter was the owner of a small American schooner called the *Rebecca*, which together with its cargo was seized by Mexican authorities at Tampico in 1884. Allegations with respect to the occurrences on which the claim is predicated are made in the memorial in substance as follows:

The *Rebecca* was built in the United States and registered at Galveston, Texas. Its approximate value was $5,000.00. In the month of January, 1884, Gilbert F. Dujay, the master of the vessel, loaded it at a small port, called Patersonville, nine miles above Morgan City, in the State of Louisiana, with a cargo consisting of six cases of merchandise destined for Brazos Santiago, Texas, and of a consignment of lumber for Tampico, Mexico. The vessel cleared at Brashear City, now known as Morgan City, on the 30th day of January, 1884, bound for Santiago, Texas. When it reached a point off this port the wind and the tide were so high that it was unsafe to enter. While lying off Brazos Santiago, on the 13th of February, waiting for a favorable opportunity to enter the port, an adverse wind from the north became so strong and the sea so rough, that the vessel was driven to the southward before a furious wind and sea, and when the wind abated it was found that the vessel was in a disabled and unsafe condition off the port of Tampico. The master, realizing the dangerous condition of his vessel, entered the port of Tampico as the nearest place of safety for the vessel,

[1] Under the convention concluded September 8, 1923, as extended by the convention signed August 16, 1927. Kristian Sindballe, *Presiding Commissioner;* Fred K. Nielsen, *Commissioner;* G. Fernández MacGregor, *Commissioner.*

cargo and crew. The crew concurred in and advised such action. When the *Rebecca* entered the port she was leaking badly. Her standing rigging had been torn away. The cabin windows were broken. The cooking stove was so badly broken it could not be used. While at sea the vessel began to leak so that the water reached the cases of merchandise, and the crew was compelled to break open the packages and store them so that they would not be ruined by the water.

When the *Rebecca* entered the port the master presented to the Mexican customs official a manifest for the goods destined for Tampico and a so-called "master's manifest" for the consignment for Brazos Santiago, Texas, which met the requirements of the law of the United States. As soon as the vessel reached Tampico, which was on Sunday afternoon, February 17th, it was anchored off the custom house and a protest of distress was immediately entered with A. J. Cassard, the American Consul at that port.

On the day following the arrival at Tampico, February 18, 1884, the Mexican custom house officials demanded from the master of the *Rebecca* the packages of merchandise on board the vessel. The demand was refused, and thereupon the packages were taken by force, and no receipt or other evidence of possession by the custom house authorities was given.

On the 21st of February the master was arrested on a charge of attempt to smuggle, was placed in the barracks with armed soldiers guarding him, was not permitted to speak to any one, and was kept in close confinement until the day following, a period of twenty-eight hours, when he was brought before the judge of the District Court at Tampico, and without the privilege of having counsel, was tried and was acquitted and released. On the 23rd of February the master was again arrested by the Mexican authorities and was required to give bond for his appearance before the Criminal Court at Tampico to answer a charge of bringing goods into a Mexican port without proper papers. While awaiting trial he remained under bond, but without permission to leave Mexico, until the 24th day of April, a period of over two months. On that date a decree was entered by the court which released the master from bail but assessed treble damages against the merchandise seized, and charged the master with the cost of revenue stamps used in the proceedings. Because of the refusal and inability of the master to pay the penalties thus assessed, the *Rebecca* and its cargo were sold by order of court, and the proceeds were applied to the Federal Treasury, a balance being distributed among certain customs employees.

On the 23rd of February, 1884, Dujay made before August J. Cassard, American Consul at Tampico, a protest against the action of the custom house officials in taking possession of the packages which the master of the *Rebecca* had engaged to deliver at Brazos, Texas, and on April 4, April 9, and April 16, 1884, other protests were made before the consul against the acts of the Mexican officials.

In the light of the allegations briefly summarized above, the United States

contends (1), that the decision of the judge in condemning the vessel and cargo was at variance with the Mexican law applicable to the case, and (2), that the vessel having entered Tampico in distress, was immune from the local jurisdiction as regards the administration of the local customs laws. On behalf of Mexico it was contended that the judge properly applied the local law, and that no fault can be found with his decision. With reliance on the opinion of the Mexican judge, it was argued that it could not be said that the law with respect to distress applied when a vessel entered the port for which it was bound, and that, in view of the character of the ship's papers, there was reason to suppose that the ship's voyage did not include the port of Brazos Santiago. It was also argued that evidence did not show the ship to be in such a condition that it could be considered to be a distress. It was further argued that, in the light of the evidence of international law, it could not be said that at the time of the seizure of this vessel there existed a rule of international law with respect to distress.

The Commission is fortunate in having before it an abundance of evidence from which it is possible to draw definite conclusions with respect to all pertinent considerations. The seizure of the vessel and the arrest of the captain were the subject of extended diplomatic correspondence between Mexico and the United States. Investigations were made by the authorities of both countries of these matters. Copies of the correspondence and records of the investigations have been produced as have also the ship's log and a copy of the court's decision upon which a denial of justice is predicated by the claimant government.

It is of course well established that, when a merchant vessel belonging to one nation enters the territorial waters of another nation, it becomes amenable to the jurisdiction of the latter and is subject to its laws, except in so far as treaty stipulations may relieve the vessel from the operation of local laws. On the other hand, there appears to be general recognition among the nations of the world of what may doubtless be considered to be an exception, or perhaps it may be said two exceptions, to this general, fundamental rule of subjection to local jurisdiction over vessels in foreign ports.

Recognition has been given to the so-called right of "innocent passage" for vessels through the maritime belt in so far as it forms a part of the high seas for international traffic. Similarly, recognition has also been given—perhaps it may be said in a more concrete and emphatic manner—to the immunity of a ship whose presence in territorial waters is due to a superior force. The principles with respect to the status of a vessel in "distress" find recognition both in domestic laws and in international law. For numerous, interesting precedents of both domestic courts and international courts, see Moore, *Digest*, Vol. II, p. 339 *et seq;* Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, p. 194, *et seq.*

Domestic courts have frequently considered pleas of distress in connection with charges of infringement of customs laws. Interesting cases in which pleas of distress were raised came before American courts in the cases of

vessels charged with violation of the interesting American so-called "non-intercourse" acts forbidding trade with French and British possessions. 1 Stat. 565; 2 Stat. 308. In these cases it was endeavored in behalf of the vessels to seek immunity from prosecution under these laws by alleging that the vessels had entered forbidden ports as a result of *vis major*. A Mexican law of 1880 which was cited in the instant case appears to recognize in very comprehensive terms the principles of immunity from local jurisdiction which have so frequently been invoked. *Legislación Mexicana*, Dublán & Lozano, Vol. 14, p. 619, *et seq.*

The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers. It has also been asserted in defense of a charge of attempted breach of blockade. It was asserted by as early a writer as Vattel. *The Law of Nations*, p. 128. In the instant case we are concerned simply with distress said to have been occasioned by violent weather.

While recognizing the general principle of immunity of vessels in distress, domestic courts and international courts have frequently given consideration to the question as to the degree of necessity prompting vessels to seek refuge. It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship foundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need nor be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation cannot justify a disregard of local laws.

The *Rebecca* did sail into Tampico, as observed by the judge who condemned the vessel, under its own power. However, it did not enter the port until after it had for three days, in a crippled condition, been contending with a storm in an attempt to enter the port at Brazos Santiago, Texas. It is therefore certain that the vessel did not by choice abandon its attempt to make port at that place, but only because according to the best judgment of the captain and his crew absolute necessity so required. In such a case a captain's judgment would scarcely seem subject to question. It may also be concluded from the evidence in the case that a well grounded apprehension

of the loss of the vessel and cargo and persons on board prompted the captain to turn south towards Tampico. It was argued in behalf of the United States that under the conditions of the weather it could be assumed that no other port of refuge was available. And even if such were not the case, there would seem to be no reason why refuge should not have been sought at Tampico. The fact that the ship had cargo for that place in addition to that consigned to Brazos Santiago, did not make the former any less available as a port of refuge. It may be concluded from the evidence that the captain had no intent to perpetrate a fraud on Mexican customs laws. Indeed his acquittal on the criminal charge preferred against him appears to be conclusive on that point, even if there were no other evidence bearing on the matter which there is. It may also be concluded that the captain had no intent merely as a matter of convenience to flout Mexican laws. This very small vessel had been driven before a strong north wind; its cabin had been damaged; its pumps had been broken and repaired; the cooking stove on the vessel had been rendered useless; there were one and a half to two feet of water in the vessel; and it had been leaking.

It was argued by counsel for the United States forcefully and at considerable length that the Mexican judge in condemning the ship and cargo misapplied Mexican law. The nature of the ship's papers, provisions of Mexican customs laws, and their construction and application by the Mexican judge were discussed in detail. It was contended that there was no violation of those laws. Whatever may be the merits of the contentions advanced, it is unnecessary to discuss this aspect of the case in view of the conclusions reached by the Commission with respect to the conditions under which the vessel entered Tampico. The ship entered the port of Tampico in distress, and the seizure of both the vessel and cargo was wrongful.

Claim is made in the sum of $10,000.00 with interest from April 24, 1884, until the date of the payment of any award rendered in the case. The sum of $10,000.00 is apparently made up of three items, namely, $5,000.00 for the vessel; $2,500.00 for the cargo; and the remainder, "the loss and expense incident" to the confiscation of the ship and cargo. The memorial contains no allegations or proofs with respect to the ownership of the cargo, and no specific information or proof with respect to the vaguely stated item of "loss and expense incident" to the confiscation. In one place in the brief it is said that the owner of the vessel was also the owner of its cargo. The Mexican answer contains no challenge with respect to the propriety of these items. However, since the ownership of the cargo is not even alleged in the memorial and is not proven, and as no information is furnished with regard to the item of incidental losses, these two items must be rejected.

Decision

The United Mexican States shall pay to the United States of America on behalf of Kate A. Hoff the sum of $5,000.00 with interest at the rate of six

per centum per annum from April 24, 1884, to the date on which the last award is rendered by the Commission.

Done in Washington, D. C., this 2nd day of April, 1929.

(S) KRISTIAN SINDBALLE,
Presiding Commissioner.

(S) B. M. ENGLISH,
Secretary.

(S) FRED K. NIELSEN,
Commissioner.

(S) JOSÉ ROMERO,
Secretary.

(S) G. FERNÁNDEZ MACGREGOR,
Commissioner.

FANNIE P. DUJAY *v.* THE UNITED MEXICAN STATES

(Docket No. 267)

Opinion rendered April 8, 1929

The common law maxim *actio personalis moritur cum persona* is not binding upon an international tribunal concerned with the question whether there has been a failure on the part of a nation to fulfil the requirements of the rules of international law, or whether its authorities have committed acts for which a nation is responsible under that law.

The claim of an heir or legal representative to recover for personal injuries suffered by the decedent during his lifetime held a property right coming within the jurisdictional article of the General Claims Convention of September 8, 1923.

Counsel: United States, Marshall Morgan, Assistant Agent, and Stanley H. Udy; Mexico, Enrique Munguía, Jr.

COMMISSIONER NIELSEN, *for the Commission:*

Claim in the amount of $15,000.00 with interest is made in this case by the United States of America in behalf of Fannie P. Dujay, executrix of the estate of Gilbert F. Dujay, an American citizen who was wrongfully imprisoned in Tampico, Mexico, in 1884. The occurrences underlying this claim are set forth in the opinion of the Commission in the case of Kate A. Hoff, Docket No. 331.[1]

As was stated in that opinion, it appears that Dujay was kept in close confinement for a period of twenty-eight hours, subsequently released, and then re-arrested on February 23rd, and while awaiting the second trial was held under bond but without permission to leave Mexico until the 24th of April of that year.

In behalf of Mexico it was contended that there was probable cause for the arrest of Dujay. It was alleged that this was shown by the fact that the *Rebecca* anchored at Tampico with an irregular manifest, which did not cover certain commodities on board, by unverified statements made concerning the weather and the forced arrival of the ship, and by other matters disclosed by the record.

Even if it be considered that there was probable cause for the first arrest of Dujay, for reasons indicated in the Hoff case, the treatment accorded to Dujay was clearly unjustifiable. Counsel for Mexico explained that Dujay

[1] Printed herein, *supra*, p. 860.

was detained pending his second trial under a process of Mexican law termed "arraigo." This appears to be a precautionary measure which may be taken incident to a civil action to secure redress against a person pending such action by detaining such person within the jurisdiction of the court and rendering him subject to penalties if he disobeys the order of detention, such penalties being those prescribed by the Penal Code with respect to the offense of disobedience to the legitimate order of the public authorities. See Book V, Title I, Chapter II of the Commercial Code of Mexico relating to mercantile tribunals.

The right of the United States to obtain compensation in behalf of Mrs. Dujay was denied by Mexico, it being contended that any wrongs suffered by Dujay were of a personal nature. It is said in the Mexican brief that the claimant "has no legal personality to appear and to ask an award for personal injuries which were suffered by Captain Dujay," and that "the right to seek compensation for personal injuries such as the arrest suffered by the deceased, complained of in the memorandum, and made the foundation of the claim in the memorial, are personal."

With respect to this point it was contended by the United States that a claim on behalf of the executor or personal representative of a decedent to recover indemnity for personal injuries suffered by the latter during his lifetime is clearly recognized by international law. The issue raised is governed exclusively, it was argued, by that law. It was further contended that, if the question whether a claim such as that presented in the instant case survived to the executrix should be considered to be governed by a rule of domestic law, and specifically, the law of the domicile of the injured person, then the claim did survive under the law of the State of Texas which was the domicile of Dujay at the time of his death. However, the fundamental contention on which counsel relied is that the issue presented is governed by international law, and that under that law a claim can be maintained on behalf of the executrix. He argued that this contention was clearly supported by numerous precedents of international tribunals, and that a proper decision on the issue raised must be reached in the light of precedents of that character.

In searching for evidence of international law on the point at issue comparatively little information will be found outside of the pronouncements of international tribunals before which questions of the character under consideration have been raised. It therefore becomes pertinent carefully to examine the opinions of such tribunals.

In the Mexican brief reference is made to the maxim of the common law *actio personalis moritur cum persona*. And in connection with this reference citation is made of three English cases, namely, Chamberlain *v.* Williamson, 2 M. & S. 408; Finlay *v.* Chirney, 20 Q. B. D. 494; and Quirk *v.* Thomas, (1916) 2 K. B. (A. C.) 513. While these cases of course support a general principle of the common law that certain actions of a personal character do

not survive, they throw little or no light even by way of analogy on the precise issue under consideration.

Chamberlain *v.* Williamson, decided in 1814, involved an action for a breach of promise of marriage alleged to have been made by the defendant to a person who died intestate. Finlay *v.* Chirney, decided in 1888, was a case in which it was held that an action for breach of promise of marriage where no special damage was alleged did not survive against the personal representative of the promisor. Quirk *v.* Thomas, decided in 1916, was a proceeding somewhat similar to the two cases just mentioned.

From the standpoint of international law, it was contended in the Mexican brief that a claim for wrongful imprisonment cannot be maintained in behalf of the heir or legal representative of the person who suffered the injury. It was argued that although such a claim might be maintained in behalf of the injured person himself, it should be distinguished from one involving the wrongful killing of a person, which might result in a pecuniary loss to persons dependent on the victim. With respect to the applicable principle of international law, the following citations were made in the Mexican brief:

> Borchard, Dipl. Protec. p. 632; Underhill's case, Ralston's Rep. 45 *et seq.;* wherein it is stated that "Underhill's death puts an end to any claim that could arise from personal injuries, insults, or other offenses"; Metzger *vs.* Venezuela, Ralston, 580; Plumer *vs.* Mexico, Op. 182; see *Reglas de Procedimiento,* Art. 11, *de la Comisión de Reclamaciones entre los Estados Unidos Mexicanos y la Gran Bretaña,* México, 1928.

The case of George F. Underhill, a claim presented in 1903 by the United States against Venezuela, was decided by the Umpire Barge, the American Commissioner and the Venezuelan Commissioner having disagreed. Claim was made in behalf of Jennie Laura Underhill on account of "personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice of a property" suffered by George Freeman Underhill. The umpire stated that "whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offenses," no proof was found in the record that Jennie Laura Underhill was entitled to administer upon her late husband's estate. The umpire declared that it did not appear whether Underhill left a will, and furthermore that there was uncertainty in the record with respect to rights that might have resulted from a previous marriage of Underhill. The claim was dismissed both as regards personal injuries and the so-called "forced sacrifice of a property." *Venezuelan Arbitrations of 1903, Ralston's Report,* p. 45. It will readily be seen that this opinion furnishes no authority with respect to the standing of a legal representative in relation to a claim growing out of personal injuries.

In the Metzger case claim was made in 1903 by Germany against Venezuela in behalf of the heirs of Metzger for an amount including indemnity for personal injuries inflicted on Metzger by Venezuelan military officers. Umpire Duffield, in an opinion by which a pecuniary award in the case was

rendered, said: "A right of action for damages for personal injuries is property. *A fortiori* is the claim in this case which had been presented and proved before the death of Metzger."

The umpire asserted that, Metzger being domiciled at the time of his death in Venezuela, his heirs would take according to Venezuelan law. He stated that under the laws of Venezuela the right of action for personal injuries survived and passed to the heirs of the deceased in so far as damages for corporeal injuries were concerned, and for such injuries an award was made. No award could be made he declared for damages to the "feelings and reputation" of Metzger. *Op. cit.*, p. 578.

There are two interesting points in this opinion: (1) that an action for damages for personal injuries is property, particularly a claim presented and proved before the death of an injured person, and (2) that Venezuelan law was controlling with respect to the survival of the claim. Irrespective of the question of the correctness of this latter conclusion, it is pertinent to note that the umpire rejected solely the item of damages for the injury to "feelings and reputation" and rendered an award in favor of the heirs on account of corporeal injuries inflicted on Metzger. It will readily be seen that this case in which a claim was successfully maintained by heirs for personal injuries to the deceased is not authority in support of any rule that claims cannot be maintained by heirs or legal representatives in a case of this nature.

The Plumer case was decided by a board of three American commissioners established under an act of March 3, 1849, (9 Stat. 393) for the settlement of claims provided for in Article XV of the treaty concluded between Mexico and the United States February 2, 1848. A claim was presented in behalf of Dorcas Ann Plumer, administratrix of the estate of Robert Plumer. It arose out of a theft of personal property from Plumer in Mexico and personal injuries inflicted on him. The board awarded damages for the loss of the personal property but rejected the item for personal injuries. The board stated, evidently giving application to the principle of the old common law rule, that the "right of compensation in damage for personal injuries dies with the person and does not survive to the heir or administratrix." *Commissioners On Claims Against Mexico, Opinions*, Vol. I, p. 182.

Irrespective of the question as to the weight that should be given to this decision of a local tribunal when considered in connection with numerous other decisions of international tribunals, it is interesting to note that, shortly after the date of its rendition, on January 24, 1850, another award was rendered by the board, on February 18, 1850, in which an indemnity of $20,000.00 was made in favor of the administratrix of George Hughes in satisfaction of a claim for damages for injuries inflicted on Hughes by troops under the command of General Santa Anna in Mexico. In the opinion in that case it is recited that Hughes was severely beaten and wounded and kept a prisoner for several weeks on a Mexican vessel, and that he was plundered of personal property. Moore, *International Arbitrations*, Vol. II,

p. 1285; Vol. III, p. 2972. It would seem to be reasonably clear from the opinion that the common law rule that personal actions do not survive was not applied in this case the decision in which apparently was therefore at variance with that in the earlier case of Plumer.

The existence or non-existence of a rule of law is established by a process of inductive reasoning, so to speak; by marshalling the various forms of evidence of international law to determine whether or not such evidence reveals the general assent that is the foundation of the law of nations. It will be seen from an examination of the cases cited in the Mexican brief that, with the possible exception of the Plumer case, they furnish no authority in support of the contention that under international law claims cannot be maintained in behalf of either representatives or heirs in cases growing out of personal injuries.

The rule in the Mexican-British arbitration to which reference is made in the Mexican brief reads as follows:

> Claims presented solely for the death of a British subject shall be filed on behalf of those British subjects considering themselves personally entitled to present them. Any claim presented for damage to a British subject already deceased at the time of filing said claim, if for damage to property, shall be filed on behalf of the estate and through his legal representative, who shall duly establish his legal capacity therefor. (Translation.)

Without discussion of the bearing of this rule on the question at issue, it may be observed that it does not seem necessarily to preclude the presentation of claims for personal injuries even though no specific reference is made to them.

Rule IV, paragraph 2, sub-section (i), prescribed by this Commission pursuant to Article III of the Convention of September 8, 1923, provides that a "claim arising from loss or damage alleged to have been suffered by a national who is dead may be filed on behalf of an heir or legal representative of the deceased." This rule appears to be in harmony with procedure sanctioned by international tribunals, numerous decisions of which are cited in the counter-brief of the United States. That this is so can be shown by references to a few illustrative cases in which claims have been filed in behalf of heirs or legal representatives. Among the numerous cases cited are cases concerned with injuries that have resulted in death; cases in which it appears that injuries inflicted were of such a nature as to have contributed to death; cases involving both loss or destruction of property and physical injuries; and cases arising solely out of personal injuries. Reference may be made to a few of the last mentioned class of cases as most apposite to the instant case.

In the claim presented in behalf of V. Garcia, administrator of the estate of Theodore Webster, Thornton, umpire under the Convention of July 4, 1868, between the United States and Mexico, held that the administrator had "a right to lay a claim before the Commission for injuries suffered by

Webster." These injuries which severely impaired Webster's health resulted from a gunshot wound inflicted by a Mexican soldier. An award of $10,000.00 was made in this case. The act of wounding Webster was, said the umpire, a wanton outrage countenanced by an officer so that his government became liable for it. Moore, *International Arbitrations*, Vol. III, p. 3004.

In the case of De Luna, which was decided under the agreement of February 11–12, 1871, between the United States and Spain, the umpire, Count Lewenhaupt, awarded $3,000.00 in favor of the brother of the deceased as administrator. In this case claim was made in behalf of the administrator on account of the arrest of his brother in Cuba in 1880. *Op. cit.*, Vol. IV, p. 3276.

In several interesting cases which came before the American-British Commission under the treaty of 1871, claims growing out of personal injuries were presented in favor of legal representatives. Demurrers filed by the American Agent in such cases setting forth that claims of this kind did not survive after death were overruled by a majority of the commission who sustained the argument of British counsel that injuries to the person, whether resulting in death or not, were, in the diplomatic intercourse of civilized nations treated as a proper subject of international reclamation in behalf of the personal representatives of the person injured after his death. The same position was taken even when all connection between the injury alleged and the death of the intestate was disclaimed in the memorial. See the claim of Edward McHugh, administrator of the estate of James McHugh, arising out of imprisonment by American authorities; claim of Elizabeth Sherman, widow and administratrix of Thomas Franklin Sherman, on account of injuries resulting from the forcible abduction of the latter by American authorities from Canada into the United States, and his imprisonment in Detroit; claim of Elizabeth Brain, widow of John Brain, for injuries sustained by the latter in connection with his imprisonment by American authorities in Washington. *British and American Claims Commission, Report of British Agent*, pp. 69–70; *Papers Relating to the Treaty of Washington*, Vol. VI, pp. 61–62; Ralston, *The Law and Procedure of International Tribunals*, p. 147.

In a reply filed by counsel for Great Britain to the demurrer of the United States, are found the following passages which are interesting, even though one may not agree with all details of the reasoning therein employed:

> This ground asserts a doctrine of the common law of England, which it is believed, is wholly unknown as a rule of international law, and is repugnant to those principles of equity and justice which underlie it. Even in the common law this doctrine has been materially modified by statute both in England and this country, so that some actions which formerly died with the person, now survive to the widow or orphans.
>
> But it is not according to the common law that this Commission is to decide the questions brought before it, but according to the principles of equity and justice. This fourth ground of the demurrer is purely tech-

nical, and what is more, thoroughly repugnant to the public law, under which this claim arises, and by the principles of which it is to be decided. . . .

The widow and administratrix of the deceased claimant who, as she avers, left her nothing but this claim, presents it for satisfaction under the Treaty of Washington. The United States, who, under the rules of international law, had released the prisoner, and promised a consideration of his claim, which it never accorded, entered into a treaty with Her Majesty's Government, which treaty gave power to this International Tribunal to decide, according to the principles of equity and justice, "*all claims on the part of*" British subjects and American citizens "arising out of acts committed against their persons and property" between certain dates. The learned Agent and Counsel for the United States now seeks to turn away a claim manifestly within the treaty by means of a maxim of the common law, which, if admitted to apply to such cases as this, limits and restricts the broad words of the treaty so as to change their power and scope. But, apart from the fact that this maxim is opposed to the spirit of the public law, the reason which gives the maxim force in the common law does not exist in international proceedings.

The injuries to the subjects or citizens of one state by the government of another, out of which arises an international claim, demand a national satisfaction to be accorded to the injured nation by the wrongdoer. Thus the claim is not a personal action, but an international proceeding, in which one government demands satisfaction of the other, by presenting the claim of its subject or citizen. Nor is this satisfaction accorded until an award be made, or a thorough investigation proves the claim to be invalid. Surely it cannot be maintained that the death of the claimant satisfies his government for the outrage committed on its territory and its subject, or that the government which had done these acts, in violation of international law, can, before an international tribunal, deny that satisfaction which it was bound to afford before the treaty was made, and which, by the terms of the treaty, it is pledged to afford here, on the ground that this claim, being a personal action, died with the claimant.

Let us consider this point in another light. There are two divisions in this claim: 1st. Two thousand dollars' damage for the abduction of the claimant, "the deprivation of his liberty, pain of imprisonment in itself, and the material immediate and continuing injury to his health, from which he never recuperated." 2nd. Five hundred and eighty-five dollars for damages to his personal estate, the items being two hundred and twenty-five dollars actually paid out for prison expenses, and three hundred and sixty dollars for loss of earnings. The first of these divisions is a claim arising out of acts committed against the person of a subject of her Britannic Majesty; the second, a claim arising out of acts committed against his property.

The claimant is dead; his claim is presented by his widow and administratrix. Now, by the decisions and practice of this Commission, as administratrix, the memorialist may claim indemnification for the injuries to the property of the deceased; but the United States now maintain that the claim for personal injuries, which would have been valid for presentation under the provisions of the treaty, which provisions are the same for both classes of injuries, died with the claimant.

Now, it is submitted that a claim growing out of a personal injury is

> as much, if not more, an international claim than one growing out of an injury to the property of the claimant. The treaty makes no distinction between these two classes of claims. According to the letter and spirit of the treaty they are to be dealt with in the same manner. *Report of British Agent*, pp. 557–559.

In an arbitration conducted between the two governments many years later under an agreement concluded August 18, 1910, the Government of Great Britain also proceeded on the theory that claims for personal injuries could be presented in behalf of a legal representative or an heir. See claim on behalf of Glenna Thomas, heir of Edward Bedford Thomas, based on complaints of illegal imprisonment and mistreatment of the latter during such imprisonment; claim on behalf of the Representatives of L. J. Levy, based on the same grounds. American Agent's *Report*, pp. 154, 157. No contention was made by the United States in this arbitration that a claim could not be filed in behalf of an heir or a legal representative in cases concerned with personal injuries.

In the case of Lucile T. Bourgeois, Administratrix, before the French and American Claims Commission of 1880, under the Convention of January 15, 1880, a claim was made for $20,000.00 on account of an arrest and imprisonment effected by Colonel Reith of the United States Army. The commission entered an award in favor of the administratrix in the sum of $1,025.00. *Boutwell's Report*, p. 60.

Citation was made by counsel for the United States of numerous cases decided by the commission under the agreement of August 10, 1922, between the United States and Germany. In these cases substantial awards were made in behalf of the estates of deceased persons who suffered physical injuries at the hands of German authorities. Among these cases were claims growing out of injuries suffered by American citizens who were on board the steamer *Lusitania* when it sank in 1915. See among others the Knox case, *Consolidated Edition of Decisions and Opinions, 1925, Mixed Claims Commission, United States and Germany*, p. 495; the Foss case, *ibid.*, p. 512.

Responsibility in the cases coming before the American-German Commission was determined not in accordance with rules and principles of international law but under treaty stipulations. However, these cases are interesting in that it is clearly shown, since awards have been made in favor of estates, that claims growing out of personal injuries were regarded by the commission as having the character of property rights. As has been pointed out, Umpire Duffield stated in the Metzger case, *supra*, that a right of action for damages for personal injuries is property. The same principle with regard to the character of international claims has been enunciated by the Supreme Court of the United States, although it may be noted that the cases in which this principle was asserted related to claims growing out of injuries to property. Comegys *v.* Vasse, 1 Peters 193; Phelps *v.* McDonald, 99 U. S. 298.

It is observed by Mr. Ralston, *International Arbitral Law and Procedure*, p. 180, that in the De Luna case, *supra*, an administrator was allowed to recover for wrongful imprisonment of his intestate in harmony with the rule often followed in the civil law as to the right of survivorship for personal damages rather than the rule of the common law. In the Metzger case, Umpire Duffield awarded damages for personal injuries on the ground that under Venezuelan law such a claim passed to the heirs of a deceased person. The impropriety of giving application to any rule or principle of domestic law in relation to a subject of this kind is readily perceived. An international tribunal is concerned with the question whether there has been a failure on the part of a nation to fulfill the requirements of a rule of international law, or whether authorities have committed acts for which a nation is directly responsible under that law. The law of nations is of course the same for all members of the family of nations, and redress for acts in derogation of that law is obviously not dependent upon provisions of domestic enactments. Domestic law can prescribe whether or not certain kinds of actions arising out of domestic law may be maintained by aliens or nationals under that law, but it is by its nature incompetent to prescribe what actions may be maintained before an international tribunal. If domestic law should be considered to be controlling on this point we should have the *reductio ad absurdum* that redress for personal injuries conformably to international law might be obtained in a country like Venezuela in which the principles of the civil law with respect to the survival of actions may obtain, and no redress for the same violation of international law could be obtained in another country where the principles of the common law obtained.

An examination of domestic law may often be useful in reaching a conclusion with regard to the existence or non-existence of a rule of international law with respect to a given subject. But analogous reasoning or comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to the relations of states towards each other. International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The purpose of a proceeding before an international tribunal is to determine rights according to international law; to settle finally in accordance with that law controversies which diplomacy has failed to solve. That is the purpose of arbitration agreements such as that under which this Commission is functioning. It would be a strange and unfortunate decision which would have the effect of precluding an international tribunal from making a final pronouncement upon the merits of any such controversy, because some rule of a particular system of local jurisprudence puts certain limitations on rights of action under domestic law. Arbitration as the substitute for further diplomatic exchanges or force would fail in its purpose. The unfortunate delays incident to the redress of wrongs by inter-

national arbitration are notorious. Injured persons often die before any redress is vouchsafed to them. A decision of this kind would seem to put a premium on such delays which would be conducive to the nullification of just claims.

It is unnecessary for the Commission in holding, as it does, that it may properly pass upon the merits of the instant claim presented by the administratrix who is also the widow of Gilbert F. Dujay, to enter upon the entire, broad field of discussion covered by the briefs and oral arguments of counsel for each government. This claim, that arose and was presented to Mexico many years ago, may well be regarded as a property right. Had it been settled when presented, Dujay or his estate would have had the benefit of it. It is competent for this Commission to pass upon the merits of the claim in the light of the terms of submission stated in the Convention of September 8, 1923. It is a claim within the jurisdictional article of the convention which provides among other things for the adjudication of claims for losses or damages suffered by persons or their properties, and in the language of the convention, of "claims for losses or damages originating from acts of officials or others acting for either government and resulting in injustice, and which claims may have been presented to either government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled."

In the case of Jennie L. Underhill, in which claim was made by the United States against Venezuela in 1903, "for personal injuries, insults, abuse, and false imprisonment," Umpire Barge dismissed the claim as regards unlawful arrest and imprisonment, but with respect to the detention of the claimant for a month and a half in Venezuela, the umpire awarded an indemnity of $3,000.00, saying with regard to this item:

> But as, furthermore, claimant claims award for damages on the charge of detention of her person;
>
> And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and
>
> Whereas it is shown in the evidence that claimant wished to leave the country which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27 such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolivar, the fact that claimant was detained by the Venezuelan authorities seems proved; and
>
> Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and
>
> Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers cannot be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the government would have been praiseworthy and sufficient. But this danger could not give the government a right to prevent Mrs. Underhill from freely moving out of the country if she

wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the government to protect the passengers from such danger on the steamers when existing.

Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

And whereas for this detention the sum of $2,000 a month—making $3,000 for a month and a half—seems a fair award, this sum is hereby granted. (*Venezuelan Arbitrations of 1903, Ralston's Report*, pp. 49, 51.)

An indemnity of $2,200.00 was paid by the United States to the Government of Norway on account of the detention of three seamen at Jersey City, New Jersey, for a few days in excess of a month in the year 1911. The men were detained as witnesses in connection with legal proceedings growing out of an explosion in the harbor which caused damage to a Norwegian vessel called *Ingrid*. In connection with the payment of this indemnity it was stated that it was made "without reference to the question of liability therefor." (42 Stat. 610.)

In the instant case the claim of $15,000.00 with interest must be rejected, but an award may properly be made in the sum of $500.00.

Decision

The United Mexican States shall pay to the United States of America on behalf of Fannie P. Dujay $500.00 (five hundred dollars) without interest.

Done in Washington, D. C., this 8th day of April, 1929.

(S) KRISTIAN SINDBALLE,
Presiding Commissioner.

(S) B. M. ENGLISH,
Secretary.

(S) FRED K. NIELSEN,
Commissioner.

(S) JOSÉ ROMERO,
Secretary.

(S) G. FERNÁNDEZ MACGREGOR,
Commissioner.

COSTELLO *v.* THE UNITED MEXICAN STATES

(Docket No. 3182)

Opinion rendered April 30, 1929

The Act of March 2, 1907, in reference to the expatriation of citizens and their protection abroad, simply deprives persons of protection while residing abroad and does not entirely nullify their citizenship.

Claim of American citizens based upon denial of justice growing out of the failure of the Mexican authorities to take adequate steps to apprehend and punish persons responsible for the death of an American whose death occurred after the presumption of having lost his citizenship under the Act of March 2, 1907, had arisen and without any steps having been taken by him to overcome the presumption, dismissed for lack of evidence of negligence on the part of the Mexican authorities with respect to the apprehension and punishment of the murderers.

Separate concurring opinions held that because of unrebutted presumption of loss of

American citizenship at time of decedent's death, Mexico was not under an international obligation to the United States to punish the murderers and the alleged failure to prosecute them did not therefore constitute as to the United States an international delinquency.

COMMISSIONER NIELSEN, *for the Commission:*

Claim in the amount of $50,000.00 with interest is made in this case by the United States of America against the United Mexican States in behalf of Lily J. Costello, John Costello, William Costello, Theresa Costello Penico, Maria Eugenia Costello and Ana Maria Costello. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate steps to apprehend and punish persons who killed Timothy J. Costello, an American citizen, in Mexico in the year 1922 and robbed his home.

During the course of oral argument the United States withdrew all claim in behalf of John Costello, William Costello and Theresa Costello Penico. The remaining claimants are therefore now Lily J. Costello, a sister of Timothy J. Costello, deceased, and Maria Eugenia Costello and Ana Maria Costello, two daughters of the deceased.

The substance of the allegations in the memorial upon which the claim is grounded is as follows:

At the time this claim arose, and for some time prior thereto, Timothy J. Costello, an American citizen, was residing in the vicinity of Texcoco, State of Mexico, Republic of Mexico, where he was a joint owner of a ranch called La Blanca. He was engaged in the business of dairying and raising dairy cows. On several occasions previous to the time this claim arose depredations had been committed upon the ranch, and Costello had requested the appropriate authorities to furnish adequate police protection to the locality in which the ranch was located but no such protection was afforded. At about 6:30 o'clock in the afternoon of January 4, 1922, while Costello was seated in his home on the ranch, bandits entered the home without warning and brutally assaulted, shot and killed Costello. James Kelly, a partner of Costello, immediately fled from the house, and although pursued by a number of the outlaws, he escaped. The bandits remained in possession of the house for some time, appropriating to their own use valuable personal articles, money and firearms.

Immediately after the murder of Costello, local authorities at Texcoco were notified with a view to having the bandits apprehended and punished for the crime which they had committed. A small number of soldiers was sent to the scene of the crime where they remained throughout the night. No efforts were made by them to ascertain the whereabouts or the identity of the intruders, and on the following morning they returned to their quarters at Texcoco. The body of the deceased could not be cared for until the proper officials had taken due note of the tragedy. It was, therefore, allowed to remain where it fell from Wednesday until Friday afternoon, in a state of decomposition, when the administrative procedure for investigating

such cases was finally completed and permission was given to inter the body. The local authorities were indifferent with respect to the apprehension of the intruders and were dilatory in acting. Although James Kelly was in the house with the deceased at the time the crime was committed, and notwithstanding the fact that the crime was committed on January 4, up to January 12, no one in authority had made inquiry of Kelly regarding the attack or the identity of the persons responsible for the crime. While some efforts on the part of the authorities were made to apprehend the persons responsible for the crime, it was not until after sufficient time had elapsed to enable them to escape. No persons have been apprehended or punished for the offense.

Questions were raised by Mexico with respect to the nationality of all persons appearing in the memorial as claimants. In view of the fact that claim is now made in behalf of only three of these persons, questions of this character of course need to be considered with respect to those three only.

There is satisfactory evidence that Lily J. Costello was born in Philadelphia, Pennsylvania, in 1887. She is therefore a native citizen of the United States.

In reaching a determination with respect to the status of the children of Timothy J. Costello, it is necessary to begin with a consideration of the status of their grandfather, Michael Costello, the father of Timothy J. Costello. It is proved that Michael Costello, who was born in Ireland, was naturalized as an American citizen by a court in Philadelphia on September 19, 1888.

It is shown by sworn statements made by Timothy J. Costello before an American consular officer in Mexico and by an affidavit executed by his brother, William E. Costello, and his sister, Lily J. Costello, that Timothy J. Costello, a British subject by birth, arrived in the United States in 1896, and resided there about ten years. The evidence before the Commission justifies the conclusion that Timothy J. Costello acquired citizenship of the United States under the provisions of Section 2172 of the Revised Statutes of the United States which reads in part as follows:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.

From an affidavit made by Lily J. Costello, and from baptismal certificates executed in Mexico, it may be concluded that Ana Maria Costello and Maria Eugenia Costello were born in Mexico in 1909 and 1912, respectively. They were, accordingly, born American citizens under the provisions of Section 1993 of the Revised Statutes of the United States which reads as follows:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the

> time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Although these children were born in Mexico, it appears that their status involves no question of dual nationality in view of the provisions of Article 30 of the Mexican Constitution of 1917 from which it appears that persons born in Mexico of foreign parents in order to be regarded as Mexicans must declare within one year after they become of age that they elect Mexican citizenship, and must further prove that they have resided within the country during the six years immediately prior to such declaration. See also the Mexican law of 1886 relative to citizenship. Costello's children left Mexico before becoming of age and have been living in the United States since 1924.

In view of the facts and the applicable law which have been stated above, it appears that this claim is now made in behalf of three American citizens. According to the record they are all at the present time residing in the United States.

For the purpose of clarifying questions of nationality raised in the case, the Commission requested the American Agency during the course of oral argument to furnish further evidence. In response to this request there were produced copies of records showing that Timothy J. Costello had been registered in the American Consulate General at Mexico City in 1911 as an American citizen; that he was again registered there in 1920, and his registration was approved; but that subsequently in the same year, an instruction was sent to the Consul General disapproving the registration. Without entering into any discussion of the conclusion upon which the Department of State based its action in cancelling the registration of Costello, it may be said that the Commission feels constrained to accept that action as conclusive with respect to Costello's status under the applicable law and regulations. The statutory provisions under which that action was taken are found in Section 2 of the Act of March 2, 1907, 34 Stat. 1228, and read as follows:

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe.

The Department of State decided that Costello had failed to overcome the presumption referred to in the above-mentioned statute which was referred to by Attorney General Sargent in an opinion rendered February 8, 1928, as being "so loosely drawn that its operation and effect have been in doubt ever since its passage." As was pointed out in that opinion, questions have at times been raised whether the citizenship of a person who fails to rebut the

presumption is terminated or whether merely the right of protection is withdrawn from such a person while resident abroad, although citizenship is retained.

It does not appear that the court of last resort has ever passed upon this point. The question of the effect of an unrebutted presumption was raised in Gay *v.* United States, 264 U. S. 353, but in that case the court held that the presumption had not arisen against the particular person whose status was under consideration by the court because of protracted residence in the country of his nativity. The court therefore found it unnecessary to make a pronouncement with respect to the effect of the presumption.

In the light of what seems to be a reasonable interpretation of the language of the statute, it seems to be clear that the law should be construed simply to deprive persons of protection while residing abroad and not entirely to nullify their citizenship, and that this interpretation is well supported by the action of both judicial and administrative officials of the Government of the United States.

On December 1, 1910, Attorney General Wickersham rendered an opinion to the Secretary of Commerce and Labor, 28 Ops. Atty. Gen. 504, with respect to the case of a native of Syria who was naturalized in the United States and subsequent to his naturalization returned to his native country, where he married a Syrian woman and remained for more than two years and then returned to the United States bringing with him his wife. The Attorney General stated in his opinion that the man did not by his residence abroad cease to be an American citizen, and that his wife should also be deemed to be a citizen and not subject to exclusion under the immigration laws, although she was afflicted with trachoma, a contagious disease. Mr. Wickersham expressed the view that the Act of March 2, 1907, was limited to naturalized citizens while residing in foreign countries beyond the period stated in the act, the object thereof being to relieve the government from the obligation to protect such citizens after residence abroad of a sufficient time to raise the presumption that they do not intend to return to the United States, and that the act did not apply to citizens who returned to the United States. This opinion of the chief law officer of the government appears to furnish the most reasonable interpretation of which this vague and uncertain language of the statute is susceptible.

It is, of course, well established the executive under the Constitution of the United States is charged with the protection of the lives and property of American citizens abroad. Under the Act of March 2, 1907, Congress has sanctioned action on the part of the Department of State, acting under the direction of the President, in prescribing certain rules under which naturalized citizens resident abroad for specified periods bring themselves in order to receive the continued protection of the government while so resident. In carrying out the statute and the rules prescribed pursuant thereto, the department is performing executive functions in relation to the protection

of citizens abroad, as it did prior to the enactment of the statute, in the exercise of a discretion not defined by these specific rules. The law provides for naturalization through judicial action and for the cancellation of naturalization through judicial proceedings. There appears to be no good reason to believe that any intent should be imputed to Congress to authorize the Department of State to cancel the citizenship of persons abroad by prescribing rules to which such persons must conform in order to prevent themselves from becoming denaturalized. The act contains no such express authorization. It makes no mention of cancellation of citizenship. It does not seem to be reasonable to suppose that Congress intended to prescribe a forfeiture of citizenship through residence abroad in the absence of explicit language such as is used in the provisions of the law relating to expatriation by naturalization under the laws of a foreign country or by the taking of an oath of allegiance to a foreign government. When dealing with the specific subject loss of citizenship Congress in clear terms prescribed the manner in which that takes place. The first paragraph of Section 2 of the Act of March 2, 1907, reads as follows:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

It seems pertinent to note the title of the Act of March 2, 1907, which is "An Act in Reference to the Expatriation of Citizens and their Protection Abroad."

Presumably executive officials of the United States have been guided by Mr. Wickersham's opinion since the date of its rendition. The Department of State which has been so very largely concerned with the construction of these provisions, has evidently acted in accordance with Mr. Wickersham's opinion. See *Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc., 1925*, pp. 120, 34, 45.

On March 31, 1916, an opinion was rendered by Judge Hough of the District Court of the United States for the Southern District of New York from which it may appear that the Act of March 2, 1907, was given a construction at variance with that put upon it by Attorney General Wickersham. United States *ex rel.* Anderson *v.* Howe, 231 Fed. 546. A person named Anderson came to the United States from Sweden in 1891, was naturalized in 1905, and in the year following returned to Sweden, where he remained continually until 1915, when he again returned to this country. On his arrival in New York the immigration authorities found him insane and nearly penniless. He having been held as an alien within the prohibited classes, and ordered deported by the Secretary of Labor, a writ of *habeas corpus* was taken out in his behalf. The court discharged the writ and remanded the relator. Anderson had not presented to any diplomatic or consular officer of the United

States evidence to overcome the statutory presumption. Judge Hough stated that, although he thought that the presumption was rebuttable, Anderson was subject to exclusion as an alien. Without going into a discussion of the facts in the Anderson case, it may be observed that they differed considerably from the facts in the case dealt with in the opinion rendered by Attorney General Wickersham. If Anderson was an alien it would seem that he could have become an American citizen only through naturalization conformably to the provisions of the naturalization law, and it is not clear why or how he should rebut any presumption that had arisen against him in order again to obtain American nationality.

The view that a person who has not rebutted the presumption becomes an alien does not appear to be supported by other opinions rendered by Federal or State courts.

It is interesting to note that Judge Learned Hand, in Stein *v.* Fleischmann Company, 237 Fed. 679, referred to the Anderson case and stated that it was one in which the treaty with the relator's country of origin, Sweden, was such that a renewal of residence in Sweden in itself repatriated the naturalized American citizen. As the case came before the court, said Judge Hand, the relator's residence, Sweden, had to be accepted as a fact, and "language regarding the Act of 1907 was therefore *obiter*."

In Thorsch *v.* Miller, 5 Fed. (2d) 118, Chief Justice Martin of the Court of Appeals of the District of Columbia stated that the court took judicial notice of the interpretation given the act by the Department of State, that the presumption "continues to exist only while the naturalized citizen continues to reside abroad, and that upon the return of the individual to the United States and upon his establishment there in good faith of a permanent residence the reason for the presumption disappears."

In Nurge *v.* Miller, 286 Fed. 982, a suit to recover property taken by the Alien Property Custodian of the United States from a man who went to Germany in 1909 and did not return until after the armistice, Judge Campbell said:

> I have, however, examined all of the cases cited and believe that the presumption may be, and in the case at bar has been overcome by the return of the plaintiff and the proof of his intention during all of his absence to remain a citizen of the United States.

See also United States *v.* Eliasen, 11 Fed. (2d) 785; and Banning *v.* Penrose, 255 Fed. 159.

It is interesting to consider in connection with the case before the Commission, the case of Nelson *v.* Nielsen, *et al.*, decided by a State court, the court of last resort of Nebraska, on April 16, 1925, 113 Neb., 453. In May of 1908, Chris Nelson, a naturalized citizen of Danish origin, sailed for Denmark. On the 18th day of December of the same year he was married in that country to a subject thereof, and by her he had a daughter, Hertha Oman, born on the 28th day of May, 1910. In 1913 he returned to Nebraska to attend

to some legal business in connection with his land, after which he went back to Denmark, where he died, November 21, 1915. Subsequently his estate was duly settled by proceedings before a probate court in the State of Nebraska, and his personal property was distributed to his widow and daughter, the court adjudging that these persons were his sole heirs, and were entitled to his real estate by descent.

Their title to the real estate was later contested by a brother of the deceased. The Supreme Court said that the statutory presumption which had arisen against the deceased on account of his protracted residence abroad was enacted to relieve the Government of the United States from the duty of protecting its citizens long abroad in certain cases, and that the presumption could be rebutted not only by the presentation of evidence to a diplomatic or consular officer but by other sufficient means and circumstances. In the light of the evidence before the court it was further said that there was no difficulty in deciding that Nelson was to his death a citizen of the United States. His daughter, whose nationality was determined by that of the father, was also a citizen, said the court. And it further stated that while it might be that the widow, as a naturalized citizen, should have registered before an American consul in Denmark in order to retain her citizenship, in the absence of proof that she had not done so, she would be considered a citizen, having become one by her marriage to Nelson.

In an act approved March 4, 1923 (42 Stat. 1516) Congress made provision for the return in certain cases of property seized by the Alien Property Custodian during the war between the United States and Germany. By Section 21 of that act it was provided that the claim for the return of property "of any naturalized American citizen" should not be denied on the ground of any presumption of expatriation which had arisen against him under the Act of March 2, 1907. The act therefore refers to a person against whom a presumption has arisen as an "American citizen" and not as an alien.

Sufficient citations have been made to show that neither the executive department of the government nor the legislative department nor the judiciary, with the possible exception of a single judge, have construed the Act of March 2, 1907, to effect a cancellation of citizenship of persons against whom the presumption therein stated has run.

When it is considered that the status of a great number of parents and children, as well as property rights the nature and extent of which can not be estimated, must have been affected by the interpretation given to the law by both administrative and judicial officials over a long period of time, it seems proper to assume that a reasonable construction such as that placed upon the act by Attorney General Wickersham would not lightly be set aside by any court. See with respect to the principle of contemporaneous interpretation, Stewart *v.* Laird, 1 Cranch 299; *The Laura*, 114 U. S. 411.

If the view should be taken that residence abroad for specified periods, coupled with the failure to rebut the statutory presumption, results in loss of

citizenship, it would be uncertain when citizenship is nullified—whether that takes place after the expiration of the statutory periods, or after a consular or a diplomatic representative has passed upon the evidence submitted by persons against whom the presumption has run, or after the Department of State has passed upon it, or after persons have been notified of rulings made in their respective cases. There appears to be nothing in the law of 1907 to justify the view that Congress intended to legislate in such uncertain terms with respect to such a serious question as the cancellation of American citizenship.

It also seems to be unreasonable to suppose that Congress enacted a measure which would seem clearly to be in derogation of the authority vested in it under the Constitution. By Article I, Section 8, of the Constitution Congress is empowered to establish an uniform rule of naturalization. It would seem to be obvious that just as naturalization takes place through the exercise of a legislative function, denaturalization can only be effected by the legislative department of the government, and not by an executive department like the Department of State. In connection with both naturalization and denaturalization Congress has imposed certain functions on the judiciary.

Under authorization from Congress, the Department of State has prescribed certain rules with respect to the rebuttal of a presumption arising from protracted residence abroad. These rules require proof explanatory of such residence. They relate to residence abroad for business purposes, or for reasons of health, or because of unforeseen exigencies, or for other specified reasons.

Undoubtedly Congress would have the constitutional power to enact a law declaring that, whenever the Department of State shall ascertain that a naturalized citizen has lived abroad for any specified period, such citizen shall cease to be an American citizen. The denaturalization here would take place upon the simple ascertainment of a fact by the department. In such a case the legislative department would not be delegating its power to make a law but merely the power to determine some fact or state of things upon which, according to the terms of the law, that department's action should depend. Two outstanding points in Field *v.* Clark, 143 U. S. 649, one of the most interesting cases in which the subject of the delegation of legislative power has been discussed, seem to be that discretion must not be vested in the Executive authorizing him in effect to make law, and that such discretion as the Executive has must relate to the execution of the law.

Congress could probably itself prescribe rules similar to those framed by the department and declare that, whenever a naturalized citizen failed, in the judgment of the department, to rebut a presumption in accordance with such rules, he should cease to be an American citizen. While in such a case undoubtedly a considerable measure of discretion on the part of the Department of State would be involved in ascertaining whether a naturalized

citizen brought himself within these rules, it would seem, in the light of decisions of the Supreme Court bearing on the subject of delegation of legislative power, that an act might properly be framed within the limits of constitutional authority.

But it would seem to be clear that Congress could not properly say that a naturalized American citizen residing abroad should cease after certain specified periods to be an American citizen, unless he complied with certain rules prescribed by the Department of State to determine conditions under which he might remain a citizen or be denaturalized. Such a law would appear clearly to have the effect of delegating to the Department of State authority to prescribe rules with respect to the denaturalization of American citizens, and in effect to give judicial application to such rules. There seems to be nothing in the law of 1907 to justify the conclusion that Congress undertook to enact such a law.

According to a ruling of the Department of State, Timothy J. Costello evidently was not considered to be entitled to protection of his government at the time he was killed in Mexico. But he was an American citizen at that time. He was not a Mexican. And he had not by any action of his government been outlawed as a man without a country. There was nothing in any established rule of domestic policy that would have precluded his government from extending protection to him at some future date after he had returned to his own country to reside.

But the precise case before the Commission is one in which complaint is made that proper steps were not taken to apprehend and punish the murderers of an American citizen. That the Department of State might have been unwilling to protect Costello had he sought its protection shortly before his death can in no way be determinative of the right of the United States at this time to invoke the rule of international law requiring effective measures with respect to apprehension and punishment of persons who injure an alien. That rule is invoked in this case with a view to obtaining compensation for three American claimants now resident in the United States.

One of the claimants, Costello's sister, is a native citizen. Costello's daughters were born American citizens. They are not naturalized citizens in the sense in which that term is generally used. The presumption referred to in Section 2 of the Act of 1907, applies to naturalized citizens only. It is possible that one of the daughters may have been born after the presumption arose against their father, but it is not at all certain that this is a fact. Even if it were and in some way that could affect her status as an American citizen, both daughters are now resident in the United States, and their citizenship seems to be unquestionable.

In passing upon the complaint of negligence with respect to the apprehension and punishment of the persons who participated in the killing of Costello and the robbery of his home, the Commission is confronted, as it has been repeatedly in other cases, with the difficulty of basing any conclu-

sion on meagre and vague evidence. Information in communications sent to the Department of State by American consular and diplomatic representatives in Mexico City is of too general and meagre a character to furnish the basis of a pecuniary award. The most definite statements furnished are found in a brief letter of January 9, 1922, transmitted by the American consular representative at Mexico City to the American *Chargé d'Affaires* in Mexico. It is stated in that letter that during the evening in which Costello was killed a small detail of soldiers went to his home, remaining there all night, but that they accomplished nothing and made no effort to find the robbers or to ascertain who they were or from whence they came. It is further stated that no one in authority made inquiry of Mr. Kelly regarding the circumstances; that as the body of Costello could not be cared for until the officials had taken due note of the tragedy, it was allowed to lie where it fell from Wednesday evening until Friday afternoon; and that no steps appeared to have been taken by the authorities other than the sending of the military detail. It is not explained in this letter what opportunities the consul had to obtain information respecting the actions of the authorities. From copies of communications exchanged between Mexican officials which have been produced by the Mexican Agency it appears that some investigations were made; also that soldiers encountered the bandits and killed the leader because he resisted arrest.

As was pointed out in the opinion of the Commission in the Archuleta case, Docket No. 175, the Commission must reach a conclusion on the strength of the evidence produced by both parties. Evidence furnished by the respondent government must of course be considered both with respect to what it may show against contentions advanced in defense to the claim and with respect to what may be revealed in support of such contentions. But the mere fact that such evidence is meagre can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant government. In the light of the unsatisfactory evidence before the Commission, the Commission is constrained to dismiss the claim.

DR. SINDBALLE, *Presiding Commissioner:*

I concur in the conclusion reached by Commissioner Nielsen, but it does not seem to me that the authorities quoted by him warrant a deviation from the wording of Section 2 of the Act of March 2, 1907, according to which a naturalized citizen in certain cases shall be presumed to have ceased to be an American citizen, as long as he does not rebut the presumption by returning to the United States with the intent of establishing a permanent residence there or otherwise and it does not appear that after the statutory presumption first arose against Timothy J. Costello, anything ever occurred which might have put him in a position to overcome the presumption.

FERNÁNDEZ MACGREGOR, *Commissioner:*

I concur in the opinion of the Presiding Commissioner. This Commission has jurisdiction over the instant case, since at least two of the claimants are

American citizens, but in view of the fact that Timothy J. Costello died without overcoming the presumption of having lost his American citizenship, it could not be said that Mexico was in relation to the United States under an international obligation of punishing his murderers and thus, the alleged failure to prosecute does not constitute as to the United States an international delinquency.

Decision

The claim made by the United States of America in behalf of Lily J. Costello, Maria Eugenia Costello and Ana Maria Costello is disallowed.

Done in Washington, D. C., this 30th day of April, 1929.

(S) KRISTIAN SINDBALLE,
Presiding Commissioner.

(S) B. M. ENGLISH,
Secretary.

(S) FRED K. NIELSEN,
Commissioner.

(S) JOSÉ ROMERO,
Secretary.

(S) G. FERNÁNDEZ MACGREGOR,
Commissioner.

BOOK REVIEWS*

Académie de Droit International. Recueil des Cours, 1927. Paris: Librairie Hachette, 1928. Five volumes. Vol. I, pp. vi, 617; Vol. II, pp. vi, 593; Vol. III, pp. iv, 675; Vol. iv, pp. iv, 651; Vol. v, pp. iv, 631. Index to each vol.

These five volumes contain the lectures delivered at The Hague Academy of International Law during the session of 1927. Altogether twenty-two professors lectured at the Academy, at this session. They represented eleven different countries and were distributed as follows: Austria, two (Stein and Verdross); Belgium, three (Bourquin, H. Rolin, and Varlez); England, two (Baker and Williams); France, four (de Boeck, Lebée, Le Fur and Niboyet); Germany, two (Kraus and Schücking); Greece, one (Streit); Italy, one (Diena); the Netherlands, two (Eysinga and Heyligers); Russia, one (Efremoff); Spain, one (Trelles); and the United States, three (Seligman, Wambaugh and Whitton). In length the lectures range from 45 printed pages to 241 pages. As in former years, the subjects treated include not only public and private international law but various allied matters, such as international morality, international finance, the League of Nations, pacific means of settling international differences, the law of nature, questions of constitutional law, criminal law, political science, emigration and social insurance.

It is not possible within the compass of a book review to summarize a series of lectures which fill five large volumes. If we may single out those which deal more directly with questions of public international law and which will probably be of most value to students, they would be the following: M. Bourquin treats the subject of crimes and *délits* against the safety of foreign states. He traces the evolution of the idea from the ancient *lèse majesté* of the Romans, through the period of the French Revolution and the reactionary period which followed. He distinguishes between crimes committed by nationals and those committed by foreigners, and between those committed within the territory of the state and those committed outside its territory. He compares and evaluates the Anglo-American theory of territorial jurisdiction, which is also that of a few continental states such as Denmark and Portugal, with the non-territorial theory followed by the great majority of Continental European states. The solution which he himself proposes is the general recognition of the jurisdiction of the injured state over such crimes wherever committed, subject to certain limitations upon its right to determine whether the crime really involves its "safety" and as to the punishment to be imposed. He emphasizes the

* The JOURNAL assumes no responsibility for the views expressed in book reviews or notes.—ED.

corresponding duty of all states to lend their assistance to the injured state in its effort to discover and punish the author of the crime.

The lectures of Professor Verdross on "the bases of international law" contain a sketch of its development, a summary of the doctrines of the classical writers and an analysis of the theories of auto-limitation and the supremacy of municipal over international law. He rejects the theory of the supremacy of municipal law as one which leads to a negative result only and sees in the collective will of states the true basis of international law.

Jonkheer Van Eysinga discusses chemical warfare and the movement for its repression. He does not share the view of some militarists that this form of warfare is not more cruel than various other commonly accepted methods. On the contrary, he considers it to be the most repugnant of all methods and likely to prove in the future the most destructive unless it is "demilitarized" as it should be. He laments that almost nothing tangible in this direction has been accomplished since 1919. This is due in part to the special difficulties (for example, the extensive use of chemicals in the industries of peace), which stand in the way of an agreement for their abolition as agencies of combat. The only satisfactory solution, he thinks, must be found in a system of international control of the manufacture of and trade in chemicals, through an international organization, to insure that they will not be used for purposes of war.

A particularly opportune subject is that of Neutrality and the League of Nations discussed—and luminously so—by Professor Whitton. He contrasts the ancient and modern practice and the changing conceptions which neutrality is now undergoing. He deals especially with the effect of the organization of the League and the principles of collective responsibility and international solidarity which underlie it, upon the rights and duties of its members in respect to neutrality. He sympathizes with the thesis of President Wilson that neutrality is no longer possible or desirable when the peace of the world and the liberty of peoples are at stake. The distinction between justifiable and unjustifiable war mankind must recognize, and *vis à vis* a belligerent who is engaged in waging the latter, other states can no longer remain indifferent and they are under no obligation to pursue a policy of neutrality.

Professor Le Fur in 177 pages gives us what amounts to a valuable modern treatise on natural law since the seventeenth century. He answers affirmatively the question "is there a natural law"? It is necessary, he says, to supplement and complete positive international law which in its present imperfect state is full of lacunae. Once discredited, it is now undergoing a renaissance. It has today a goodly number of partisans among distinguished jurists in Belgium, France, Germany, England and the United States, of whom Le Fur may be counted as one of the best known. Its sanction may be found in Article 38 of the Statute of the Permanent Court of International Justice; it was invoked in the opinion of that tribunal in the Chorzow case and has been

relied upon to some extent by the courts of England and the United States in many decisions, some of which he cites. The theory of the law of nature was long distrusted because of the false conception which was held of it; the modern conception of it as being merely a principle of right and justice to be applied when there is no governing rule of positive law is something not to be rejected but must be accepted and applied if justice is done.

A very valuable contribution of present interest is Professor de Boeck's treatment in 197 pages of the subject of expulsion of foreigners and the international difficulties to which expulsion gives rise. He reviews many actual cases, analyzes the international jurisprudence, the national legislation of various countries, the *projets* of the Institute of International Law, and discusses the grounds upon which the right of expulsion may be legitimately exercised. He concludes that a certain number of fairly well suited rules may be drawn from custom, practice, treaties, national legislation and the decisions of arbitral commissions. There is a general agreement, he says, that expulsion is not legitimate when the procedure is arbitrary and when the grounds of expulsion are not sufficient. As to what are justifiable grounds, however, opinion and practice are not entirely unanimous. Unfortunately it is not practicable, as he points out, to specify in detail the particular grounds upon which expulsion is justifiable. He thinks however, that the exercise of the right should be subject to judicial control, either national or international.

One aspect of the question which has been made prominent by the extensive denationalization measures of certain countries, for example Russia, he does not discuss, namely, where can an undesirable foreigner who has no nationality be expelled to, in case his original country is unwilling to receive him?

A valuable contribution of 219 pages to the history of international law is that of Señor Trelles of Spain on Vitoria and the modern school of international law. He discusses with detail and great learning the theories of the Spanish internationalists of the sixteenth and seventeenth centuries, of whom Vitoria was the great master.

Several lecturers dealt directly or indirectly with the League of Nations or certain of its activities. Undoubtedly, of these contributions, that of Professor Schücking on the development of the Covenant is of the greatest current interest. He shows how the Covenant has developed through interpretation and practice, in a somewhat similar manner to the Constitution of the United States, so that already after the lapse of less than ten years since its adoption it has been supplemented in various important particulars and in some parts its original meaning modified. He points out also that the organization of the League is slowly becoming more "democratized," particularly the Council which has been considerably enlarged and the principle of non-reëligibility introduced.

The lectures of M. Henri Rolin on the practice of international mandates

make another contribution to the study of the actual workings of the League. He discusses the development of the idea of mandates before 1914 and at the Peace Conference, the distribution of the mandates in accordance with the treaties of peace, the conditions upon which they are held, the constitution of the Permanent Mandates Commission, guarantees of the rights of the population, etc. Naturally the elusive question of sovereignty receives his attention. He rejects all the theories heretofore advanced and expresses doubt whether the question is really susceptible of satisfactory solution. Finally, he dwells upon the advantages of the system of mandates and pays a high tribute to the intelligence and loyalty of the Permanent Mandates Commission.

Other lectures which for lack of space can only be mentioned here are those of M. Efremoff dealing with a development of international conciliation and in which the author argues for the conclusion of a universal multilateral treaty to take the place of the present multiplicity of bilateral treaties; those of Miss Wambaugh on the practice of international plebiscites which contain a study of the plebiscites of the past and a discussion of the conditions which experience suggests as essential to the successful operation of plebiscites under modern conditions; those of Dr. Stein on the international law of insurance, a new and increasingly important branch of international law; of M. Lebée on international trusts and cartels; of Professor Baker on the present juridical status of the British dominions in the domain of international law—a comprehensive treatise of 241 pages; of Professor Streit on the Greek conception of international private law; of M. Varlez on international migrations, which contain a historical summary of the great emigration movements, an analysis of the immigration legislation of the more important countries, and a study of the progress of international regulation; of Professor Kraus on international morals; of M. Heyligers on the history, constitution, jurisdiction and functioning of the mixed courts of Egypt; of Professor Diena on the conception of international private law according to Italian doctrine and practice; of Sir John Fischer Williams on some legal aspects of international transfers of wealth among states, in which the learned author discusses the legal conditions governing such transfers and the mechanism and means by which it is done; and of M. Niboyet on the theory of the autonomy of will—a study in private international law, particularly of the power of the parties to choose their law in matters of contract when a conflict between the law of two different countries is involved.

The fifth volume of the *Recueil* ends with the admirable lectures of Professor Seligman on double taxation and international fiscal coöperation, in which he analyzes the various proposals that have made for the elimination of double taxation and dwells upon the difficulties due to the existence of different systems of taxation in force in different countries and the varying conceptions held by different peoples. He points out that as between the two solutions in the form of bilateral and multilateral arrangements, the tech-

nical experts advocate the former because of the variety of systems now in force. Professor Seligman, however, does not consider it necessary to choose between the two. There is no reason, he says, why groups of States which have substantially similar systems (*e.g.*, the income tax systems of England, the United States, Germany and the Netherlands) should not conclude a multilateral treaty among themselves, while other groups having a different but similar system as among themselves, should not do likewise. Finally, there are certain features common to all systems which might be dealt with through a general treaty while those common to only two or more might be regulated through bilateral or regional treaties. In any case there is a manifest advantage in dealing with the problem so far as possible through multilateral treaties and in reducing to a minimum the number of bilateral treaties.

J. W. GARNER.

A Selection of Cases and Other Readings on The Law of Nations, chiefly as it is interpreted and applied by British and American courts. By Edwin De Witt Dickinson. New York: McGraw-Hill Book Co., Inc., 1929. pp. xxii, 1133. $6.00.

If proof were needed that the study of international law in our colleges and law schools is developing in a way that offers the brightest promise for the future it may be found within the covers of this large and impressive collection of cases and readings. For it has long been the reproach of the science of international law that its preoccupation was more with theory than with concrete issues, that it dealt with historical problems rather than with present realities, and that its study was of little concern for the practising lawyer. Part of the reproach has been answered some time since by the increasing study of international organization as part of collegiate courses in general political science. In these courses the primary concern has been to present the fundamental principles governing international relations and the newer international agencies set up to administer matters of common interest between all states. These are vital parts of international law, and it may be noted from the outset that they are largely outside the scope of the present volume.

There are, however, other phases of international law which are of more particular interest to the professional lawyer. Suits frequently arise between private individuals which can only be decided by the application of rules of international law. Here the court must often determine for itself in advance what is the rule of law to be applied to the circumstances before it. At other times the suit is between a state and an individual, citizen or alien, who is being prosecuted for alleged crime or whose property has been taken under the provisions of domestic law. Again, more rarely, a strictly international case between state and state may come before an arbitral court for decision. These three groups of cases form the bulk of Professor Dickinson's

volume. They present to the student a number of technical problems which the lawyer must be prepared to meet in his daily practice, but at the same time they constitute an important body of judicial opinion in which the general principles of international law are discussed in the light of the concrete situations presented to the court. In this latter respect they are of as great value to the political scientist as they are to the practising lawyer. For they are evidence of what the national or international court believes to be the true rule of law. This is not, indeed, the final test of international law, but it is the material out of which international law is finally developed.

Many of the old familiar cases that figure in the collections of Scott and of Evans appear in the present collection. On the other hand much of the older material is discarded as having too remote a connection with present issues. New cases have been added which cover the events of recent years and which illustrate problems that the editor found it desirable to present to the student. It will be of great convenience to teachers to obtain the texts of the recent decisions relating to the status of the unrecognized Soviet government of Russia, as well as recent decisions relating to territorial waters and to the status of public commercial ships in foreign ports. A number of important new cases dealing with nationality, with international responsibility for the protection of foreign lives and property, and with the succession of governments and of states are included that are not readily obtainable elsewhere. These new cases would alone make the volume indispensable.

The classification of the subject-matter follows more or less traditional lines; but in the selection of his cases the editor has chosen to consider primarily the value of a particular case as challenging the attention of the student, so that leading cases have been omitted which failed to have that effect and relatively unknown cases included. Apparently for reasons of pedagogy the editor has decided to present the cases out of their chronological order. This has its advantages and its disadvantages, and doubtless no two teachers would quite agree as to the best method of arrangement. One serious disadvantage which it presents to the reviewer is that it obscures somewhat the historical development of international law. The editor had in mind his practical experience as a teacher and determined the order of his cases and topics by the effective response of his students.

An outstanding feature of the new collection is that in spite of its size its scope is more limited than that of the earlier casebooks. Here the object of the editor was to stimulate the interest of the student by a more intensive study of certain fundamental topics. There will be few to question the decision of the editor in excluding most of the cases relating to the law of war and many of those relating to neutrality. Relations of peace that are governed by political standards of conduct rather than by principles of law have also been omitted as more suited to advanced study. In addition to the collection of cases the editor has included a selection of codes, constitutions and statutes showing the reaction of municipal law to the obligations of

international law. A number of treaties is also included illustrating limited or general agreements creating or modifying international obligations. Supplementing these public documents are the opinions of publicists coming down from Grotius to recent contributors to this JOURNAL.

It need hardly be said that Professor Dickinson's volume will meet with a warm welcome from teachers of international law. Its scholarly and accurate handling of documents, its valuable footnote annotations, its references to foreign material not readily accessible, its combination of classic cases and recent decisions, and its emphasis upon post-war events and upon topics now occupying the attention of governments all combine to make it an immensely helpful adjunct to the equipment of professors of law and political scientists alike. And it should be added that the publishers as well as the editor are to be congratulated upon producing a beautiful piece of book-work sold at a most modest price.

C. G. FENWICK.

Éléments Créateurs du Droit Aérien. By André Henry-Coüannier. Paris: Per Orbem, 1929. pp. iv, 343. Fr. 33.

A careful examination of this book leaves the impression that the best service which the reviewer can render is to attempt to give a brief synopsis of the contents of what, in his opinion, is one of the most important volumes published on the subject of air law. It is, perhaps, unnecessary to state that the name of the author is, of itself, adequate guaranty of the excellence of the work.

In his opening chapter the author announces at the outset that the present work is limited to a consideration of "various questions of international law," such as the right of flight over private property, rights of sovereignty over air space, aërial frontiers, aërial customs, air routes, the nationality and matriculation of air craft in time of peace, and "aërial warfare." Chapter I is an historical sketch of the beginnings of legal conceptions of air law and their development up to the World War. The old codes have felt the "rude shock" of contact with judicial problems which have come into being since human flight passed from fiction into fact. So novel were those problems that established principles cannot be systematically applied under cover of reasoning by analogy. If air navigation was or is to live and develop, governments legislating both domestically and internationally were and are bound to work out "laws entirely new." "It is the study of these new laws and conventions which constitute the domain of aërial law."

Chapter II is an historic sketch of post-war air law. The author emphasizes the importance of correctly analyzing the terms of the Convention for the Regulation of Air Navigation of October 13, 1919, "for its provisions will have a notable influence upon all legislative and administrative acts which are to follow after." But he feels that, in spite of the improvements made in the convention, "we must admit that serious difficulties must be

overcome before all the states consent to adhere to it." Reference is made to the Havana Conference of January 16, 1928, and to its 37 articles dealing with international air navigation. "It cannot be denied," says Professor Henry-Coüannier, "that this convention, when put into effect, would be a blow directed against the uniformity of the regulation of aërial navigation all over the world, and that it would give rise to delicate questions of application in countries which, like Chile and Uruguay, would be at once parties to the Pan American Convention and that of October 13, 1919."

Under the title "Aërial Space and Property Rights," the author points out that air space is a geometrical figure whose main characteristic is lack of susceptibility to ownership. The outstanding feature of the chapter is the effect of the new art upon the application of the maxim *cujus est solum ejus est usque ad coelum*—that ancient precept which is injected into all continental law in various forms and with various modifications—into Article 552 of the French Civil Code in the terms "ownership of the soil includes ownership of what is above and below it. . . ." New legislation became necessary because with the arrival of the era of human flight, "once more was the public interest to carry the day and impose restrictions upon the rights of landowners with respect to aërial space." The author comments on remedial legislation in the form of the Air Navigation Act of Great Britain (Act of 1920, Article 9) and the French Law of May 31, 1924, which provides that "aircraft are free to navigate above French territory" (Art. 19) but provides that "the right to navigate aircraft above private property can not be carried on in such a way as to interfere with the exercise of the owner's rights." Here is outstanding exemplification of Judge Baldwin's statement, published in this JOURNAL now nearly twenty years ago, that "modern government tends at all points to push the public good farther and farther into what was formerly thought the inviolable domain of private right."[1]

In his chapter on "Aërial Space and the Right of Sovereignty" the author shows how the theory of the sovereignty of the air, which trembled in the balance at the Paris Conference of 1910, blossomed into an established principle as the result of the World War, and was announced an accepted doctrine in the Paris Convention of 1919. The announcement of that doctrine the author characterizes as "the principal weakness of the convention, . . . a two-edged sword with respect to the great powers"; for, in thus closing their aërial space to states non-signatories of the convention they in turn authorize such states to close theirs. He believes either that the days of the announcement of absolute sovereignty may be numbered, or that it will remain a dead letter, "so great will the need be of meeting the call of aërial international navigation."

Under the title of "Aërial Travel" the author dwells upon "the conception of aërial frontiers." "Surface frontiers" are distinguished from "frontiers of volume"—the latter a frontier zone proposed for the purpose of

[1] "The Law of the Airship," this JOURNAL, Vol. 4 (1910), p. 95.

regulating international relations—a zone indicated by ground monuments —a space "which constitutes, conventionally speaking, a frontier wall of great thickness," not subject to the exclusive sovereignty of one state. The progress of aërial travel brings with it the realization that "frontiers are not of a single, but of a multiple character." On the vexed question of nationality with respect to aircraft engaged in international navigation the author takes the view, and sustains it with able reasoning, that the nationality of the aircraft shall be that of the state under the certificate and flag of which it flies, and that states should only confer their nationality upon, and permit to be flown under their flag, aircraft piloted by their nationals.

In his chapter on aërial warfare, he points out that the antiquated and somewhat feeble formula of the *Institut de Droit International* that "aërial warfare is permissible but only if it does not subject a peaceful population to greater dangers to person or property than does land or naval warfare" is, in the light of the development and lessons of the past twelve years, untenable; doubly untenable in view of the "impossibility for this type of war to exist without injury to non-combatants." While the author unhesitatingly expresses the opinion that the employment of aircraft, for the above reason, should be suppressed in war time, he is equally convinced that *in war time* it would be idle to attempt to suppress it. "It is well worth while to recognize this situation in the hope that it will help governments to turn more readily toward arbitration, impelled by the horrors of a warfare which will respect nothing."

CLEMENT L. BOUVÉ.

Studies in International Law and Relations. By A. Pearce Higgins. London: Cambridge University Press, 1928. pp. viii, 314. Index.

The interdependence of international relations and international law is emphasized in this work, which is a collection of studies, many of which have already been published but revised or rewritten for this purpose. The first three chapters are devoted to a general discussion of the difficulties which exist in international relations. The third chapter is a particularly pungent exposition of the emphasis which should be placed upon the duties of states rather than upon their privileges and rights under the society of nations. So much is heard at the present time about the rights of small nations that there is a tendency to overlook or underestimate the duties of those same small nations if they are to be entitled to membership in international society. An interesting discussion of the position of the Papacy in international law is contained in Chapter IV. A chapter is devoted to the place of the Monroe Doctrine in international law and relations, presenting the negative aspect of the doctrine as enunciated by Elihu Root before the American Society of International Law in 1914 and the positive side as presented by Professor Higgins "there shall be no intervention or domination by any non-American State in, nor any attempt to extend the European system to,

any portion of the Western Hemisphere." The Locarno Treaties are examined in some detail, and the latter half of the book is taken up with expositions of problems presented by enemy ships in port at the outbreak of war, submarine cables in time of war, ships of war as prize, retaliation in naval warfare, and defensively armed merchant ships.

W. LEON GODSHALL.

The International Protection of Trade Marks by the American Republics. By Stephen P. Ladas. Cambridge: Harvard University Press, 1929. pp. viii, 136.

This book was published under the auspices of the Bureau of International Research of Harvard University and Radcliffe College and the Harvard Studies in International Law. It is a study of the problems of Inter-American trade mark protection and repression of unfair competition, and it is a portion of a longer work by the author on international protection of industrial property in general, which is now in press, and is likewise being published under the auspices of the bureau just referred to. This more limited study was published in advance of the forthcoming major work for the purpose of facilitating the conference of trade mark experts and specialists of the American countries held at Washington in February of this year. The volume was, thus, timely and serviceable.

The first few pages of the volume are devoted to a definition of industrial property and to discussions of the divergencies between the laws of the various countries in regard to such property, the injustices that such divergencies frequently cause to foreigners, and of the inadequacy of the attempts from the middle of the nineteenth century on, by means of treaties of commerce or special bipartite agreements, to remedy these injustices. The development of industrial property rights was far from uniform in the various countries of the world, because of the great variety of conditions of industrial and commercial life that prevailed, and of differences in the traditional technique in handling legal materials, the analogous legal principles, and the administrative practice. In spite of these differences, however, many countries drew upon the legislative experience and administrative regulations of those countries whose "general law and legal phraseology" were akin to their own. There grew up, as a result of this practice, three groups of countries, whose underlying ideas and general principles and administrative regulation are in some respects similar, namely: "the English speaking countries, the Latin countries (France, Italy, Spain, Latin America, etc.) and the Germanic or Northern European countries (Germany, Austria, the Netherlands, Norway, Sweden, etc.)." But even within these groups there is no uniformity, and as a result, the interests of foreigners were inadequately protected. Some effort was made to afford protection after the middle of the last century by means of commercial treaties or special bipartite treaties, but the result was not very satisfactory, since these arrangements did not modify

or alter the municipal laws and practices of the contracting parties, to say nothing of the instability of commercial treaties. The volume gives an excellent summary of the history and provisions of the various conventions and arrangements from 1883 on designed to bring relief.

Part III is devoted to the problems that arise in connection with the Inter-American Protection of Business Relations, and Part IV to a discussion of the problems of protecting the priority of trade marks and of the effective protection against infringement and unfair competition. An excellent analysis of the different systems of trade mark registration in the American countries and in many other countries is given under the discussion of the protection of priority of marks.

Part V is entitled, "Suggestions for the Forthcoming Pan American Trade Mark Conference" held at Washington in February. These convincing suggestions are fully justified by the illuminating discussions in the four preceding parts of the volume.

The volume is, of course, interesting primarily to lawyers; it has, in addition, a definite bearing on the economic and trade relations between the American countries, and it forms a basis for future studies of the industrial problems that will, doubtless, arise between these countries in ever increasing number. If the volume seems somewhat too compact it must not be forgotten that it was published in advance of a more general publication with the specific purpose of facilitating the work of experts and specialists in conference. It is splendidly documented and systematically arranged and organized. One looks in vain for an index, however, but, perhaps, the excellent table of contents dispenses with the necessity of one. The last 51 pages are devoted to appendices, in which the author happily collects for the convenience of the reader several recent conventions and one arrangement bearing on the subject of his book. The research is painstaking and thorough, and those interested in the subject will welcome the appearance of Dr. Ladas' major study.

WILLIAM E. MASTERSON.

Labor and Internationalism. By Lewis L. Lorwin. New York: Macmillan, 1929. pp. 682.

This book deals with a subject that is rich in material, but heavily befogged in prejudices and hitherto distinctly lacking in analysis and synthesis. Tribute should be paid to the author for bringing unity of understanding into so anarchic a field as labor internationalism, for creating a sympathetic apprehension of that movement, and, not the least, for showing the significance and future of labor in the world's nationalistic economy.

The volume is admirable as the account of the movement of the world's workers in unity and disunity. The tale is dramatically presented in a series of part and chapter headings that have genuine literary merit and summarize some fundamental synthesis. Book I (The Story) shows the

development of the theme under such heads as the teeming mass of ideas, peace and progress; parliament of the proletariat; cohesion and conflict; the great failure (the turnabout); war and revolution; world upheaval; retreat and confusion; Washington, Amsterdam and Moscow; moods of transition; internal crisis; conflict of capitals; American drifts; Pan-American strains; adjustment and realignment. Book II (The Outlook) contains such chapter titles as these: The course of Amsterdam; Amsterdam and Geneva; the challenge of communism; the Third International and its satelites (claims and computations); the Anarcho-Syndicalists; the voice of the Christians; horizons ahead. These are only part of the more vividly descriptive juxtapositions of ideas to denote the dramatic evolution of the subject. In addition, there are appendices of tables, bibliography, notes, a list of *dramatis personae*—very valuable and unique—and a full index, altogether nearly seven hundred pages.

One can readily see how extraordinarily exhaustive and painstaking in its detail the volume is, and how well it succeeds in doing in one volume what might have been done in two. Those of us who know the author personally know also that the book, while written over a space of two and a half years, represents thinking and study for over fifteen years from the time the author wrote his doctor's thesis on French syndicalism (published in 1914 under his then name of Louis Levine). The study represents matured thinking and extended experience, and has literary qualities of a high order. It cannot help but be authoritative for a long time to come.

The outcome of labor internationalism is not so hopeful. Yet it seems to me it would have been more hopeful if a little different setting had been given to the International Labor Office. One carries away the implication that the International Labor Office is a correlative organization to Amsterdam or a substitute or antithesis for the Third International. It is, of course neither, but rather a coördinating institution which labor may use as its center of concentration for the expression of its policies. For the International Labor Office is the producers' (labor-industrial) aspect of the world community and gives official standing to both employers and workers in the world society. It stamps both forces as international. That is very important, first because the one great defect of the international labor movement in the past has been its anti-nationalism, and second because all problems of labor must find their expression in national decisions of sovereign states. Under these conditions the International Labor Office as a treaty-sponsored organ gives labor an accepted and legitimate standing in the scheme of legalized international coöperation. It gives labor the necessary institutional unity and legitimacy which it has hitherto lacked. (With change of words the same is true for employers.)

This is obviously the reviewer's point of view, though Mr. Lorwin has perhaps put the same thing in a more generalized form, when he observes that the chief function of labor is that of eliminating future war by insisting upon

"economic justice at home and abroad," "fair play in the use of the economic resources of the world," and "development of methods by which the relative claims and rights of nations and classes may be amicably adjusted." Labor organizations, he concludes, "must serve as guardians of the international machinery which now exists and as missionaries for promoting new and more effective instruments of international coöperation. Along this road lies the chance of workers' internationalism for greater unity in its own ranks and for leadership in the movement towards a Great World Society."

LEIFUR MAGNUSSON.

American Foreign Relations—Conduct and Policies. By John Mabry Mathews. New York: The Century Co., 1928. pp. xiv, 700. Index. $4.00.

This volume is in large part a reprint of the author's *The Conduct of American Foreign Relations*, issued in 1922. The original text, brought down to date and enlarged by three chapters, becomes Part II, under the heading "Conduct," and covers 390 pages. Part I, entitled "Policies," covering 214 pages, has a brief introductory chapter indicating how international relations develop, and this is followed by a short five chapter discussion of policies and relations, and by three additional chapters in regard to the League, the World Court, and Peace. Appendices covering 85 pages include eight documents, and two reprinted papers written by the author, as supplementary material.

The volume as a whole is obviously issued for textbook purposes rather than for the general reader, and is still basically a discussion of the methods of treaty-making and of the diplomatic and consular services. This material is carefully prepared and gives clearly the essential facts needed in order to comprehend the agencies and methods used by the United States in its dealings with other nations.

Part I is in general a brief summary of policies, which are more fully treated in other works to which he refers, and adds nothing new in material or interpretation. The part is probably inserted to enliven by a discussion of actual policies the somewhat prosaic chapters of Part II. The appendices are documents readily accessible in other sources of information and merely pad the volume rather unnecessarily.

Professor Mathews has done painstaking work in the revision of his earlier volume included as Part II, and made excellent additions by inserting Chapters XIV and XV on the diplomatic and foreign service. It is a question, however, whether he did wisely in adding Part I to the volume, since its subject matter is not directly related to Part II and has small value in itself.

J. Q. DEALEY.

Die Auswärtige Politik des Deutschen Reiches 1871–1914, published by the *Institut für Auswärtige Politik* in Hamburg under the direction of Albrecht Mendelssohn Bartholdy and Friedrich Thimme. Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1928. 4 vols. pp. xi, 799; 749; 730; 877. Register of persons.

Few individual scholars can afford to buy or give space to the voluminous collections of documents already issued or in process of publication by the governments involved in the World War. Yet a more general availability of the texts of the more important of these documents is on many accounts desirable. The solution of the difficulty is to be found in abridged editions. Dugdale's translation of the German documents, the first volume of which was reviewed in the April number of this JOURNAL, is such an abridgment, designed to reach four volumes, as does this one compiled under the direction of the two surviving editors of the original *Grosse Politik der Europäischen Kabinette*. Bulky as are these books, their size is insignificant compared with the 43 original volumes—a selection from the Kautsky documents being included.

Such rigorous condensation, naturally, could be accomplished only at the sacrifice of much that would be of interest; but it must be considered that even the main publication represents only a limited selection from the mass of original papers, excluding much that is by no means chaff. The principle of selection in the case of this publication is indicated in the title. Instead of being designed to illuminate the policies "of the European Cabinets," as is the main series, the abridgment is restricted as closely as possible to those of Germany. It is obviously a more logical and easily exercised principle of choice among German documents than Dugdale's of assembling those which concern relations with England. The basic preference is simply for instructions and Foreign Office memoranda over despatches. All documents included are printed in full; and all those looked for as important test cases were found. Gaps there are too, inevitably, which must be filled by summaries. These make no pretence of being mere editorial abstracts of omitted documents or simple chronological records. They are, as admitted in the introduction, passages of historical narrative frankly expressing the writers' opinions, less likely to be misleading as such than professedly objective abstracts often prove. The result is, however, a *mélange* which is sometimes confusing, the more so because of the slight typographical distinction between narrative and documentary texts.

The material is arranged according to a scheme, distinct from that of the *Grosse Politik*, of brief topical chapters grouped generally in chronological order. The date line of each document is followed by the reference to its place in the original series; and references to documents not included are made in footnotes to the narrative sections. The new arrangement is, on the whole, handier than the original, or than the strictly chronological order of the French translation. In addition to its own value, the

abridged edition increases the usefulness of all the material in the full publication.

J. V. FULLER.

Le Rôle du Conseil de la Société des Nations dans le Règlement Pacifique des Différends Internationaux. By A. H. Philipse. The Hague: Martinus Nijhoff, 1929. pp. viii, 285. Gld. 6.

The author of this study is a *docteur en droit* and holds a diploma from the *Institut Universitaire de Hautes Etudes Internationales* of Geneva. The book contains six chapters, a conclusion, and thirteen annexes giving a résumé of as many leading disputes settled or considered by the Council of the League of Nations. A useful bibliography and alphabetical table are also carried. The bibliography is conspicuous for the absence of American authorities.

In Chapter I the author offers general observations on the peaceful objects of the League, the necessity that every society have directive organs, the composition of the Council and its relation to the Assembly. He then carefully differentiates between the power of the Council to settle disputes of its *own initiative* because of its directive position and its power derived from special clauses of the Covenant, notably in Articles 12 and 15, which presuppose an *appeal by one of the disputing parties.*

Chapter II deals with differences which may be considered by the Council and the rules of procedure. Chapter III carries a table showing that of twelve disputes there cited, ten were brought up under Article 11, and two under Article 15. Article 10 was involved once (Greco-Bulgarian Case) and Article 17 once (Eastern Carelia Case). The Corfu Case invoked Articles 12 and 15.

In Chapter IV it is pointed out that the actual examination of the dispute by the Council may take the form of a *direct* examination or an *indirect* consideration through a commission of inquiry, a commission of jurists, or the request for an advisory opinion from the Permanent Court of International Justice. The following chapter takes up the three possibilities in the case of a unanimous report by the Council: (1) where the two parties adopt the recommendations; (2) where one party accepts while the other rejects; (3) where both parties reject. In the latter case the report is without "any juridical effect" (p. 186). Where the Council fails to reach unanimity, the obligations resting on the League members not parties to the dispute are discussed. The view of Schücking and Wehberg that the non-disputing members should remain passive is thought to be too strained by the author. He believes that they retain entire freedom of action (p. 188).

In the final chapter devoted to the action of the Council regarding states not members of the League, the author concludes that non-members not having accepted the contractual obligations of Article 17 are left where international law leaves them, their sovereignty being unrestricted. The Council's

recommendations in such cases would be merely advisory, purely of a political nature (p. 196). The real step forward is to make the League universal.

In concluding, Dr. Philipse states that "in the actual state of the law the procedure before the Council is a great step in advance; for the realization of the peace of nations it constitutes only a step which should be followed by others even more considerable" (p. 211).

Aside from the careful and worth-while discussion of the problems indicated above, the book is very useful for the materials collected in the annexes relating to the principal disputes considered by the Council. It is remarkable that so much material on the Council's work is at hand, considering the limited time of nine years of activity.

J. EUGENE HARLEY.

International Arbitration from Athens to Locarno. By Jackson H. Ralston. Stanford: Stanford University Press, 1929; London: Humphrey Milford; New York: The Baker & Taylor Co., 1929. pp. xvi, 417. Index. $5.00.

The author, in his "foreword" presents this book as the natural complement to his earlier book *The Law and Procedure of International Tribunals*, which he describes as the only book in English containing in detail a critical digest of the decisions and practices of arbitral and other international courts of justice.

The present publication discusses the theories and principles which underlie judicial settlement of disputes between nations, and reviews the history of international arbitration during the period indicated by its title.

In this volume Judge Ralston has produced a comprehensive history of arbitration from ancient times to the present, and with admirable thoroughness and lucidity, he has analyzed and classified the influences and incidents which have entered into its development and the principles and practices which must be relied on for its further advancement.

The discussion of the subject is separated into five parts, the first of which deals with "General Principles of Judicial Settlement between Nations," and the next with "Influences working toward Judicial Settlement." The other three parts deal with actual arbitrations and arbitral tribunals grouped under the headings "History of Arbitral Tribunals," the "Hague Peace Conventions and their results" and "Permanent Court of International Justice."

Recognizing the Jay Treaty as marking the beginning of the modern era of arbitrations, especially between Great Britain and the United States, the author, in addition to a critical review of each of the important arbitrations throughout the world since that treaty elucidated by a concise statement of the issues and outcome in each case, has appended a "List of Arbitral and other Judicial Tribunals functioning between Nations since 1794."

This history of arbitration is not assumed to be the last word on the subject, for the history of arbitration is still in the making, and arbitration as an

instrument in the organization of the world for peace is only at the beginning of a period which promises to be the most constructive in its history. Nevertheless, by reason of its comprehensiveness of treatment and accuracy and clarity and authority of statement, this work as a historical appraisal of arbitration and its influence in international relations is a supremely important contribution toward its orderly and sound development.

CHANDLER P. ANDERSON.

Die Entscheidungen des Internationalen Schiedsgerichts zur Auslegung des Dawes-Plans. Erste Session (März, 1926), Teil II: Zivil- und Militärpensionen für Elsass-Lothringen und Posen-Pommerellen, Naturalrestitutionen, Kohlenlieferungen an den Dampfer "Jerusalem." Deutsch herausgegeben von Dr. Magdalene Schoch. Berlin-Grünewald: Dr. Walther Rothschild, 1929. pp. xvi, 150. M.10. (*Politische Wissenschaft: Schriftenreihe der Deutschen Hochschule für Politik in Berlin und des Instituts für Auswärtige Politik in Hamburg, Heft 3*).

We now have the second volume of Dr. Schoch's edition of the decisions of the Dawes Plan Tribunal which was promised in her first volume,[1] and which deals with the questions of the status under the Dawes Plan of pensions in Alsace-Lorraine and Posen-Pomerelia, of property restored in kind to the Allies or their nationals by Germany under Article 238 of the Treaty of Versailles, and of a claim for compensation for coal supplied by the British to a Ukrainian vessel which had been engaged in hospital service on behalf of German troops in the Black Sea during the period of the Armistice. No further editions of Dawes Plan Tribunal materials by Dr. Schoch are at present promised, and perhaps none are justified, but it might seem only logical to complete the republication of the decisions of the tribunal up to the end of the application of the Dawes Plan and its supercession by the Young Plan.

Since Dr. Schoch's first volumes were reviewed here[2] there have been printed in the JOURNAL a leading article on the Tribunal itself[3] and the text of No. III of the awards of the tribunal[4] which was treated in Dr. Schoch's third volume. The text of the award edited by Dr. Schoch in this her second volume was printed in the JOURNAL three years ago.[5]

The comments made upon Dr. Schoch's treatment of her materials in reviewing her first volumes might be repeated here. The tribunal is praised for its decision in the pensions problem but actually accused of going upon "political" grounds in its decision on the status of restorations in kind, and exceeding its competence under the constituent documents! The decision

[1] This JOURNAL, Vol. XXII, No. 1 (January, 1928), p. 229.
[2] This JOURNAL, as cited.
[3] This JOURNAL, Vol. XXII, No. 4 (October, 1928), p. 797.
[4] Same, p. 913.
[5] This JOURNAL, Vol. XX, No. 3 (October, 1927), p. 506.

on the question of supplying coal to the *Jerusalem* was so obviously sound as not to be open to question. All together, one feels that the end of the Dawes Plan and its incidental disputes and its tribunal will be a good thing for all concerned!

PITMAN B. POTTER.

China and Her Political Entity (A Study of China's Foreign Relations with Reference to Korea, Manchuria and Mongolia). By Shühsi Hsü. New York: Oxford University Press, 1926. pp. xxiv, 438. Index.

This work is unique in its use of sources in the Chinese language. It was commenced at Columbia University and completed at Peking where state documents and memoirs of importance became exceptionally available. How long and deeply desired in the western world has been research of this nature by Chinese scholars with rendering into western language of excerpts from the papers of Chinese statesmen! As Chinese self-expression on China's foreign relations Dr. Hsü's *China and her Political Entity* has interest and authority which peculiarly invigorate western thought.

The first 100 pages are historical. Over long centuries, indeed tens of centuries, the course of action of China toward her neighbors at the east and north was of good will and moderation; and the first treaty in western form, that of Nertchinsk, 1689, with Russia, about which there has been misunderstanding on point of reciprocity, is quoted in translation from the Chinese text as making certain a full commercial reciprocity. Russia's difficulties in the Crimea in 1856 moved her to acquire north-eastern Asia at the expense of China and under details of negotiation here shown in new light.

Diplomacy regarding Korea, early and late, brings exceedingly many citations to documents in Chinese and relates them to American and European documents. The Viceroy Li Hung-chang negotiating with the Marquis Ito in 1885 wrote of him: "This envoy has traveled extensively in Europe and America and has done his utmost to learn from them. He is in possession of statesmanlike qualities; applying himself diligently to commerce, to neighborliness, to the welfare of the people, and to the training of the army and navy; not prone to bellicose talk, nor to aggression against small nations. There is no doubt that within a decade Japan's prosperity and power will be considerable. This is a distant and not an immediate danger to China. I earnestly hope that those who are at the helm of state will occupy their attention with the problem while there is still time." Of the action of the United States resulting in separation of Korea from China one dislikes to read.

Chapters follow on the war with Japan and some of its consequences, the Boxer Rebellion, reconstruction of Manchuria, and developments since the revolution, including relations with Russia as to Mongolia. Very numerous matters heretofore not available in a western language and apparently not

used by the Chinese Government for strengthening its action are indicated within the compass of this book. The historical and documentary detail essential to effective administration of international law could have been commanded by a foreign office diligent and continuous in its conduct of affairs.

Dr. Hsü is one of the younger men of China with western university training in political science research. It is to be hoped and believed that the example of his useful selection and translation of documents and memoirs will result in greatly improving the western understanding of Chinese statesmanship.

FRANK E. HINCKLEY.

Survey of International Affairs, 1926. New York: Oxford University Press, 1928. pp. xii, 565, $8.50. Maps. Index.

The Conduct of British Empire Foreign Relations Since the Peace Settlement. New York: Oxford University Press, 1928. pp. xii, 126, $3.00. Index.

These valuable studies, like their precedessor *Survey of International Affairs, 1925* (reviewed in the JOURNAL, January, 1929, Vol. 23, no. 1, pp. 253–255), are issued under the auspices of the Royal Institute of International Affairs, London. Both are made under the guidance of Arnold J. Toynbee, Director of Studies for the Institute and Research Professor of International History in the University of London, who made a genuine contribution in the volume on *The Islamic World since the Peace Settlement* in the series of three volumes comprising the 1925 survey.

The second of the two studies listed above, in a little more than a hundred pages, gives an excellent summary and discussion of how the foreign relations of the British Empire have been conducted since the Peace Conference, a period of change and rapid growth. The volume, as the author suggests, is concerned, not so much with political as with constitutional history, especially the one aspect that bears upon foreign rather than inter-imperial or internal affairs. Here are discussed: the membership in the League of Nations of states members of the British Commonwealth, the diplomatic and consular representation of states members of the British Commonwealth (other than Great Britain) and of foreign states in one another's capitals, coöperation between states members of the Commonwealth in the conduct of foreign relations. One of the principal contributions of the study is found (Section II) in the distinction between "passive" and "active" belligerency in connection with which is discussed the "Chanaq incident" of September, 1922, when the situation was tense between Turkey and Great Britain. The appendix is devoted to the problem of smuggling and to frontier relations between Canada and the United States, treating "water questions arising in the Basin of the St. Lawrence and the Great Lakes."

The 1926 *Survey* volume, on the other hand, completes the record of the more important world events from the signing of the Versailles Treaty to the

end of the year 1926, although the longest chapter, which deals with events in China, recorded in the second volume of the *Survey* for 1925, is carried on to February, 1927. A history of the Inter-Allied debts since the war and of the administration of the mandates and dependencies in the Pacific is included. There is also a section (Section V) on Chinese Immigration into tropical territories in the Pacific area of interest to the student of migration. American readers will be especially interested in a section on the United States and the Permanent Court of International Justice (Part I A, Section 11) by Dr. H. Lauterpacht, LL.D., Assistant Lecturer on International Law at the London School of Economics. This section is a statement of the important developments in the United States in connection with the Permanent Court and has keen observations as to how the seeming presumption of certain American attitudes appeared to members of the League of Nations.

The appendix contains important documents relative to the Inter-Allied Debts, China, Japanese Foreign Policy. Especially valuable in the appendix is the Chronology of Events and Treaties for the period January 1 to December 31, 1926, continuing the chronology which was given in Volume III of the 1925 *Survey*, thus adding to that work, which incorporated the chronology of International Events and Treaties from January 1, 1920 to December 31, 1925.

The scholarship of these two volumes commends them to the specialist in international affairs. Their readable style also makes them of interest to the lay reader who wishes to supplement his general reading along this line with careful, comprehensive studies.

CLARENCE RICHARD JOHNSON.

The Constitutional Law of the United States, 2d edition. By Westel Woodbury Willoughby. New York: Baker, Voorhis & Company, 1929. 3 Vols.: I–lxxxiii, 624; II–xvii, 625–1325; III–xvi, 1326–2022. Index.

Teachers and students of constitutional law, and lawyers too, have long awaited a new edition of Willoughby's *Constitutional Law of the United States*. It has at last appeared and from those who recall the merits of the original work it is sure of a warm welcome.

A casual examination of the new edition discloses at once that the task of revision and modernization has been thoroughly done. The first edition was a two-volume work, comprising sixty-five chapters and 1,390 pages, and cited some 1,350 cases. The new edition is a three-volume work of over 2,100 pages, and cites over 3,100 cases. Making due allowance for the greater size of the page of the new edition, one would not go far wrong in saying that it contains twice the matter of the earlier edition—is, in other words, for fully half of its content, itself a new work.

It is instructive to note, moreover, that this increase is due largely to the treatment given to two clauses of the Constitution—the commerce clause, and the due process of law clause (along with the equal protection clause) of

the Fourteenth Amendment. The original edition was devoted principally to the subject of national power and to the relations of the National Government and the States; and the question of the relation of legislative power, particularly that of the States, to private rights was largely ignored. Thus, though the work appeared in 1910, which was some five years after the Supreme Court's decision in the famous case of Lochner *v.* New York, that case is nowhere mentioned. This omission is amply repaired in the new edition. Whereas in the earlier work the subject of Due Process of Law was disposed of in a single chapter of 18 pages, the portion of the present work which is devoted to Due Process of Law and the related topic of Equal Protection of the Laws runs to 15 chapters of 276 pages. It is, in fact, a systematic treatise on the subject, and an excellent one.

The enlargement of space devoted to the commerce clause is equally striking. On this subject the two chapters of 148 pages of the earlier Willoughby have been superseded by 18 chapters of 376 pages! The increase is chiefly due to the attention paid Congressional legislation of recent years regulative of commerce. The developing importance of statutes in construction of the Constitution, as Congress in response to social pressure enters more and more upon active tenancy of its powers, thus receives fitting recognition.

Another topic to receive greatly increased attention is Freedom of Speech and Press, owing to the importance which it attained during the late war and the years immediately following. Still another reflection of recent developments is to be seen in the vastly greater attention given to administrative commissions and to other phases of "administrative law"—a branch of constitutional law which twenty years ago had scarcely acknowledged a distinctive appellation, although Professors Goodnow and Freund were even then vigorously endeavoring to induce the infant to answer to their call. Conversely, a comparison of the earlier with the new edition serves to show how large a part of the textual Constitution is practically sterile as a source of constitutional law. Thus of the 65 chapters of the first edition, Professor Willoughby has found it possible to reincorporate fully 40 in his new edition without material addition or change.

A chapter which students of international law and relations will find of special interest, because of its discussion of questions on the border-line between those subjects and constitutional law, is Chapter XXXVI on The Constitutional Limitations upon the Treaty-Making Power. Dealing with the vexed question of the termination of treaties, Professor Willoughby distinguishes between the annulment of a treaty as "law of the land" and its termination as an international compact; and while he concedes the former to be within the power of Congress, the latter he contends belongs to the President alone. Thus he writes (p. 585):

> In so far as a treaty is regarded as an international compact, it seems almost too clear for argument that Congress, not having been made by

> the Constitution a participant in the treaty-making power, has no constitutional authority to exercise that power either affirmatively or negatively, that is, by creating or destroying international agreements.

And further along (p. 587) he makes the additional point that Congress has neither the power to give notice to a foreign government of the termination of a treaty nor to compel the President to do so. The reviewer is not entirely convinced by this reasoning. So far as international law is concerned, the difference between a power to pronounce an international agreement at an end and a power to render it unenforcible by repealing it as law of the land would appear to be insubstantial. The practical purport of the distinction for which Professor Willoughby contends is, therefore, to be sought in the domestic forum, and it consists in claiming for the President the power to cancel the international engagements of the United States on his own sole notion of the fitness of things. The review, however, which he furnishes of American practice in this matter goes only a very little way to sustain either the claim for such a prerogative in the President or a previous awareness of a distinction between terminating a treaty and repealing it as law of the land. It is true, of course, that Congress does not participate in treaty-making; but it can authorize agreements within the field of its legislative powers, and when it does so a duty of negotiation is imposed upon the President. Similarly, when it repeals a treaty as law of the land, the President, as the organ of diplomatic intercourse, becomes constitutionally obliged to inform the other party to the treaty; just as, for example, upon a declaration of war by Congress, he becomes obliged to exert his powers as commander-in-chief. Nor should it be overlooked that Congress is vested with the powers of any sovereign legislature in the international field.

Dealing with the much discussed decision of the Supreme Court three years ago in Myers *v.* the United States, attributing to the President a legally illimitable power of removal over executive officers of the National Government, Professor Willoughby serviceably draws attention (p. 1527) to the words of ex-Solicitor General Beck in comment on that decision (*New York Times*, Nov. 7, 1926):

> The decision does not decide whether or not there may not be a class of officers who are not in strictness executive officers. For example, the Federal Trade Commission is chiefly a fact-finding Commission to aid Congress in formulating legislation. The Interstate Commerce Commission is a fact-finding Commission which discharges the so-called legislative duty of imposing reasonable rates upon carriers. The Comptroller General is regarded as the special representative of Congress in seeing that its appropriations are faithfully disbursed. Can the President remove such quasi-legislative officials? This [Myers] decision is not conclusive upon this point, and properly so; for no case of this character was before the Court.

Although these words of assurance do not accord very well with the court's specific reference to "executive tribunals" with "duties of a quasi-judicial

character," it is desirable to keep them fresh in mind against the day when the court may be called upon to qualify its over ambitious opinion in the Myers case.[1]

It would be difficult to overpraise this admirable work. Its one conspicuous defect is its apparently arbitrary arrangement of topics, a defect that is satisfactorily repaired by the excellent table of contents and the index. It can be confidently predicted that "Willoughby *On the Constitution*" will in its renewed youth more than repeat its earlier success.

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[1] *See also* Professor James Hart's article in the August *American Political Science Review.*

* Mention here does not preclude a later review.

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